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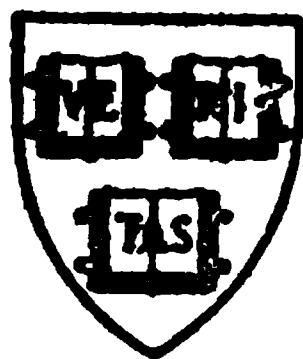
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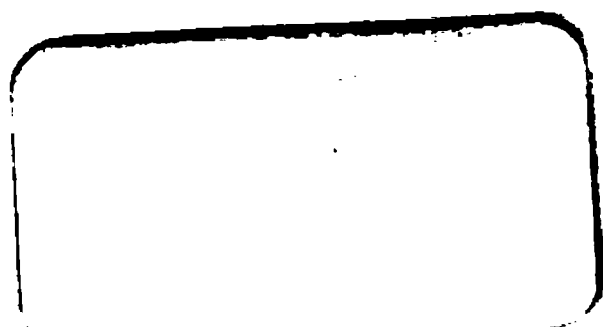
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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT

OF THE
STATE OF INDIANA,

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-BOOKS
CITED, STATUTES CITED AND CONSTRUED, AN INDEX
AND NOTES TO THE REPORTED CASES**

PHILIP ZOERCHER,
OFFICIAL REPORTER

NORMAN E. PATRICK, Assistant Reporter

VOL. 55

**CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1912, NOT
REPORTED IN VOLUME 54.**

INDIANAPOLIS:
WM. D. BURFORD, PRINTER TO THE STATE
1915

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JUN 9 1915

JUDGES
OF THE
APPELLATE COURT

OF THE
STATE OF INDIANA,

WHOSE OPINIONS ARE CONTAINED IN THIS VOLUME.

HON. MOSES B. LAIRY.*↑↑
HON. JOSEPH H. SHEA.↑§
HON. EDWARD W. FELT.¶
HON. JOSEPH G. IBACH.¶
HON. MILTON B. HOTTEL.¶
HON. FRED S. CALDWELL.†
HON. ANDREW A. ADAMS.↑↑

*Chief Justice at November Term, 1913.

†Presiding Judge at November Term, 1913.

¶Elected in 1910, reelected in 1914.

§Elected in 1912.

↑↑Elected in 1910.

†Appointed September 1, 1913, to fill the unexpired term of Hon.
Andrew A. Adams, resigned, and elected in 1914.

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CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1913, IN THE NINETY-SEVENTH AND NINETY-EIGHTH YEARS OF THE STATE.

CRAWFORD ET AL. v. SPINDLER.

[No. 8,094. Filed November 25, 1913.]

1. **INJUNCTION.—*Bonds.—Construction.***—An injunction bond executed pursuant to §1210 Burns 1908, §1153 R. S. 1881, should be liberally construed to carry into effect the purpose of the statute, which is to require “payment of all damages and costs which may accrue by reason of the injunction or restraining order” to “the adverse party affected thereby.” p. 6.
2. **INJUNCTION.—*Bonds.—Construction.—Persons Protected.***—An injunction bond executed pursuant to §1210 Burns 1908, §1153 R. S. 1881, is not to be construed in accordance with the strict rules applicable to obligations governed by the common law, but the purpose of the statute must be read into the bond in the light of §1278 Burns 1908, §1221 R. S. 1881, providing for recovery on a defective bond as if it were perfect, so that an injunction bond will inure to the benefit of all defendants though by its terms made payable to one only. p. 7.
3. **INJUNCTION.—*Action on Bond.—Real Party in Interest.***—Plaintiff, who as county surveyor, had performed services in connection with a proceeding to clean a drainage ditch, and had been compelled to employ counsel to procure the dissolution of a restraining order granted on the application of the defendants in a suit by them to enjoin the cleaning of such ditch, was, in his individual capacity, a real party in interest and entitled to maintain his separate action on the injunction bond, although such bond ran jointly to him as surveyor and another as township trustee, and notwithstanding he had been made a party to the injunction suit in his official capacity. pp. 7, 10.

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4. **INJUNCTION.—Bonds.—Actions.**—Where an injunction bond was entitled in the name of the plaintiff against two defendants, the name of one of whom was followed by “trustee” and the other by “surveyor,” and the obligation was to “pay to defendant therein any and all damages and costs which may occur to them or either of them,” such surveyor, who as an individual procured a dissolution of the restraining order, could maintain an action on such bond in his individual capacity, since the words “trustee” and “surveyor” as therein used, so far as the bond discloses, are merely *descriptio personae* and are to be treated as surplusage. p. 9.
5. **BONDS.—Construction.—Words Descriptio Personae.**—Although words that are merely *descriptio personae* will be disregarded as surplusage, there are cases relating to public corporations, to banks and to contracts, that are in the nature of exceptions to the rule, where it appears that the words were not used as merely descriptive of the person, and that the obligation or benefit is not personal. p. 9.

From Superior Court of Allen County; *Carl Yaple*, Judge.

Action by David F. Spindler against Henry C. Crawford and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Richard K. Erwin, for appellants.

T. E. Ellison, for appellee.

FELT, J.—This is a suit by appellee, David F. Spindler, against Henry C. Crawford as principal and Hugh McFadden, George W. Coverdale and William Daffon, his sureties on an injunction bond. The complaint in substance charges that the plaintiff is the duly elected, qualified and acting surveyor of Allen County, Indiana; that in July, 1909, Charles S. Bash and others, filed with him as such officer a petition asking for the cleaning out and repair of certain ditches in Aboit and other townships, Allen County, Indiana; that in pursuance thereof he examined and surveyed said ditches and made an estimate of the cost of such repairs and apportioned the benefits and costs thereof, and reported the same to David Forsythe, trustee of said Aboit Township; that certain landowners against whose lands

assessments were made appealed to the Allen Circuit Court and thereafter the court heard said appeal and on February 7, 1910, modified some of said assessments, but entered judgment ordering and directing said trustee to clean out and repair said ditches; that thereupon said trustee gave notice that he would let a contract therefor on February 28, 1910; that on February 24, 1910, said Henry Crawford commenced an action in the Huntington Circuit Court against plaintiff as surveyor of Allen County and said Forsythe as trustee of Aboit Township, to enjoin the letting of said contract, and the making of said repairs as ordered by the Allen Circuit Court; that to obtain a temporary restraining order in said suit, said Crawford gave a bond, executed by him and his codefendants, which bond is filed herewith and made a part hereof, in which the obligors promised and agreed to pay all damages and costs which might accrue to plaintiff and to all other persons interested in the matter by reason of the issuing of said restraining order, which bond was approved by the Huntington Circuit Court; that thereupon an order was duly issued and served upon plaintiff and said Forsythe, restraining them from entering on the land of said Crawford, and from letting said contract and from proceeding further in said matter until such time as said court might fix for the hearing of said petition for an injunction and until the further order of the court; that plaintiff was duly served with a copy of the complaint of said Crawford and of said restraining order; that thereafter plaintiff did appear in said court in pursuance of the order made in said suit, and filed a motion to dissolve said restraining order which motion was sustained by the court on April 15, 1910, and thereupon on said day plaintiff filed a demurrer to the complaint of said Crawford which was sustained; that said Crawford refused to amend his complaint and to further prosecute said action and thereupon the court rendered judgment against him that he take nothing by his suit and that he pay this plaintiff his costs

in said action; that it was necessary to employ counsel to represent plaintiff in said suit and he did employ counsel who represented him in said proceedings, and he also incurred other expense, the details of which are duly alleged; that the value of said services, and the cost to him, so occasioned, amounted to \$500, "all of which is due and remains wholly unpaid."

A copy of the bond sued on is as follows:

"State of Indiana, County of Huntington. In the Huntington Circuit Court. ————— Term, 1910. Henry Crawford, vs. David H. Forsythe, Trustee and David Spindler, Surveyor. We the undersigned hereby undertake that plaintiff in the above entitled cause shall pay to defendant therein any and all damages and costs which may occur to them or either of them any and all damages and costs which may accrue to him by reason of the restraining order of temporary injunction herein granted. In witness whereof we have hereunto set our hands this 24th day of February, 1910. H. C. Crawford, Hugh McFadden, Geo. W. Coverdale, William M. Daffon.

Approved by me this 24th day of February, 1910. Samuel E. Cook, Judge of the Huntington Circuit Court."

A demurrer to the complaint for want of sufficient facts was overruled and an answer of general denial was filed on behalf of all the defendants and also a second paragraph, the substance of which is that the facts of the complaint are admitted, except the averments tending to show a liability to plaintiff personally; "that David Spindler as an individual was not a party to said suit for injunction in said Huntington Circuit Court and was not sued as an individual but * * * the cause of action * * * was commenced and prosecuted against David Spindler in his official capacity as surveyor of Allen County, Indiana, and not otherwise;" that David Spindler had no interest whatever in the subject-matter of the litigation and the injunction was issued against David Spindler as surveyor of Allen County, Indiana, and the bond sued on is payable to "the

surveyor of Allen County, Indiana, and not otherwise.” To this answer a reply was filed in general denial. The court at the request of the parties made and filed a special finding of facts. The facts found are substantially as alleged in the complaint, and it is also found that said Spindler as surveyor, examined said ditches and made report thereon for which he was entitled to pay in the sum of \$150; that plaintiff employed Thomas E. Ellison as his attorney in said injunction suit and directed him to take such steps as were necessary to prevent a judgment being taken against him; that said attorney in pursuance of said employment rendered services in said suit and employed C. W. Watkins, an attorney of the Huntington Circuit Court as local counsel; that the reasonable value of the services of said attorney is \$200; “That said Spindler employed said Thomas E. Ellison, not as surveyor of Allen County, but as an individual to protect his interest and prevent judgment being rendered against him.”

Judgment was duly rendered in plaintiff's favor for \$200 and costs. Appellants' motion for a new trial was overruled and likewise their motion in arrest of judgment. Appellants have assigned as error the overruling of the demurrer to the complaint, error in the conclusions of law, in overruling the motion for a new trial and the motion in arrest of judgment. On these several assignments the briefs present two principal questions which are decisive of the whole case: (1) The bond being payable to two persons can appellee alone maintain a suit thereon? (2) The bond being payable to “David Spindler, Surveyor”, can David Spindler maintain a suit thereon?

Counsel for appellants earnestly insists that the judgment in this case is erroneous because it appears that the suit was not brought in the name of the real party in interest, as required by §251 Burns 1908, §251 R. S. 1881; that David Spindler, the individual, was not a party to the suit in which the restraining order was issued, and the same

was issued against him in his official capacity as surveyor of Allen County, Indiana, and the bond sued upon is payable to him as such officer and not to him personally; also that the bond is payable jointly to David F. Spindler, surveyor, and David H. Forsythe, trustee; that the failure to make Forsythe a party plaintiff violates §263 Burns 1908, §262 R. S. 1881; which requires all persons having an interest in the subject of the action to be joined as plaintiffs; that the obligation being payable to two persons jointly, suit cannot be maintained thereon by one of such persons.

The bond in suit is a statutory obligation required by §1210 Burns 1908, §1153 R. S. 1881, and should be liberally construed to carry into effect the purpose of the

1. statute, which is to require "payment of all damages and costs which may accrue by reason of the injunction or restraining order" to "the adverse party affected thereby." *Conner v. Paxson* (1822), 1 Blackf. 208; *Sheets v. Hays* (1905), 36 Ind. App. 106, 111, 75 N. E. 20, and cases cited. In the case, last cited, certain taxpayers brought suit against the board of commissioners of Vigo County, to enjoin the board from making payment to one Fred L. Jessup for the construction and improvement of a certain gravel road. Jessup was not made a party to the suit and on November 27, 1899, a restraining order was issued against the board of commissioners for the purpose aforesaid and a bond was duly executed payable to said board; that thereafter on his own motion, Jessup was made a party defendant, and on his motion duly made, the restraining order was dissolved and the case was stricken from the docket and judgment rendered against plaintiffs for costs. Jessup brought suit on the injunction bond and recovered. On appeal, this court held that he was properly admitted as a defendant, was a party in interest and entitled to recover on the bond made payable to "the defendant" and executed before he was a party to the suit. In *Boden v. Dill* (1877), 58 Ind. 273, our Supreme Court held that a bond executed

by the plaintiffs in a suit against several defendants,
2. inures to the benefit of all defendants though by its terms it was made payable to only one of the defendants. The court on page 275 said: "The point made in these demurrers is, that, as the undertaking, in terms, bound the undertakers to Henry Dill only, he and Edward Dill could not maintain a joint action upon it. The point would, doubtless, be well taken, if the undertaking were to be regarded as a mere common-law obligation. But the undertaking is provided for by statute. It is intended as an indemnity to all the defendants in the action in which the injunction is issued, whose rights may be injuriously affected thereby * * *. As the plaintiffs were both the owners of the mill propelled by the waters of the stream which they were enjoined from damming, and both injured by the injunction, the above statute enables them both to sue upon the undertaking as if it had been in terms made to them both." The court in the above decision cites the statute (§1278 Burns 1908, §1221 R. S. 1881) as applicable to aid a defective bond given to secure the party against whom a restraining order is issued. The strict rules applicable to obligations governed by the common law, do not apply to statutory bonds. The purpose of the statute (§1210, *supra*) requiring such bond, must be read into the obligation in the light of the liberal provisions of §1278, *supra*.

From the averments of the complaint as well as the findings of the court, the appellee, as an individual, is shown to be the real party in interest. The court finds that
3. there was due him \$150 for surveying the ditches and apportioning the assessments to the several landowners. While in doing such work, he acted as an official, the loss of the amount due him, nevertheless, would have been personal, and would not in any way have affected him in his official capacity. While the office enabled him to do such work and present a legal claim therefor, the money

earned was due him personally and neither the office of county surveyor nor the claimant in his official capacity would have been in any way affected either by the collection or the loss of the amount due for said work. The finding shows that he employed counsel and incurred the expense, for which he obtained judgment, as an individual and not in his official capacity. It is quite apparent that he could not bind the county of which he was surveyor, for any expense so incurred and it was therefore from the beginning a question for the plaintiff personally to resist the injunction or suffer a personal loss. The finding further shows that he incurred the expense personally and not jointly with the other payee named in the injunction bond. While we find no decision where the particular points presented by this appeal have been presented and decided, yet considering our statutes and the decisions of this and the Supreme Court on analogous questions, we are forced to the conclusion that appellants are not sustained either in the contention that the bond is only payable jointly to the two obligees and can only be enforced in a suit by them jointly, or that appellee is not the real party in interest. We think this conclusion must be reached independent of the form of the statutory injunction bond, but in this case we are fortified by the wording of the bond itself which makes it payable to either or both the obligees for the damages and costs accruing "to them or either of them * * * by reason of the restraining order." The complaint and finding show that appellee, as an individual is the real party in interest and we hold that he is not barred from a recovery as such, either by the capacity in which he was made a party to the suit for an injunction or by the form of the bond. We therefore conclude: (1) that, on the facts of this case, appellee is entitled to recover the damages caused him by the wrongful issuance of the restraining order, notwithstanding two payees are named in the obligation; (2) that appellee as an individual may recover the damages due him

as aforesaid, notwithstanding his official character as disclosed by the pleadings and the findings of the court.

While not basing our decision wholly on the proposition, there is an additional reason, on the facts of this case, supporting the second conclusion. It will be observed

4. that the bond sued on is entitled "Henry Crawford v. David H. Forsythe, Trustee, and David Spindler, Surveyor" and binds the obligors to "pay to defendant therein any and all damages and costs which may occur to them or either of them." So far as the bond discloses, the words following the names of the defendants afford the only evidence of their official relation or character. Under numerous decisions such words are merely *descriptio personae* and do not change or affect the personal relation of such parties to the obligation. *Hobbs v. Cowden* (1863), 20 Ind. 310, 313; *Jackson School Tp. v. Farlow* (1881), 75 Ind. 118, 123; *McClellan v. Robe* (1883), 93 Ind. 298; *Wolke v. Kuhne* (1886), 109 Ind. 313, 10 N. E. 116; *Albany Furn. Co. v. Merchants Nat. Bank* (1896), 17 Ind. App. 531, 535, 47 N. E. 227, 60 Am. St. 178; *Taylor v. Reger* (1897), 18 Ind. App. 466, 470, 48 N. E. 262, 63 Am. St. 352; *Guthiel v. Dow* (1911), 177 Ind. 149, 151, 97 N. E. 426. It has been held that an obligation payable to a person styling himself administrator or guardian of a certain estate or person may be enforced by such person in his individual capacity, or by his assignee, and that such words will be treated as descriptive of the person and as surplusage. *Castro v. Evinger* (1896), 17 Ind. App. 298, 301, 46 N. E. 648; *Speelman v. Culbertson* (1860), 15 Ind. 441; *Shepherd v. Evans* (1857), 9 Ind. 260, 261; *Barnes v. Modisett* (1833), 3 Blackf. 253. This rule is certainly applicable here where it clearly appears that nothing was expended by or due to the office of county surveyor and that the expense was incurred by and due to appellee in his individual capacity. Cases
5. which are in the nature of exceptions to the foregoing general rule may be found, but such cases relate to

public corporations, to banks or to contracts which show that the words were not used as merely descriptive of the person, and that the obligation or benefit is not personal. *State, ex rel. v. Helms* (1893), 136 Ind. 122, 126, 35 N. E. 893; *Avery v. Dougherty* (1885), 102 Ind. 443, 445, 2 N. E. 123, 52 Am. Rep. 680; *Hodge v. Farmers Bank, etc.* (1893), 7 Ind. App. 94, 98, 34 N. E. 123.

Most of the cases cited by appellants' learned counsel may be distinguished by the fact that the bonds considered were not statutory and were governed by common-

3. law rules that do not control in this State, in construing such obligations. The case of *Hyatt v. City of Washington* (1897), 20 Ind. App. 148, 50 N. E. 402, 67 Am. St. 248, is cited by counsel and relied on to show that appellee cannot maintain this suit in his individual capacity. This was a suit on an injunction bond to recover damages for attorney's fees in a suit resulting in the dissolution of the injunction. The names of the mayor and marshal of the city were placed in the bond as obligees, and it was held that any rights under such bond would not accrue to such officers personally but to the city. The court on page 150 said: "Construing the complaint and the bond, filed as an exhibit, together, it is evident that the city of Washington is the real party in interest. There is, in effect, but one obligee named in the bond. Any right accruing to the persons named in the bond as obligees would not, by the express terms of the bond, accrue to them as individuals, but as officers of the municipality. The two persons named are designated as 'mayor of the city of Washington' and 'marshal of the city of Washington' respectively, and as individuals they have no connection with the matter." The city of Washington was plaintiff in the suit on the injunction bond and the judgment in its favor was affirmed, notwithstanding the bond was made payable as above indicated. The real party in interest recovered judgment and the form of the obligation did not render the judgment erroneous,

though technically the payee was not properly designated in the bond. Such result was inevitable under the rules above announced, and the principle which controlled the decision supports the judgment in the case at bar, for in each instance the real party in interest recovered.

The case of *Dunham v. Seiberling* (1894), 12 Ind. App. 210, 39 N. E. 1044, cited by appellant, is not in conflict with our conclusion. The decision simply holds that on the facts of that case a person, who was not a party to the injunction suit, who was not named in the bond and who did not belong to any class of persons referred to in the bond, and who was in no way bound by the restraining order, could not recover on the bond made payable to the defendants. The other questions suggested do not require detailed consideration and are covered by what we have already said. There is no available error shown by the record. Judgment affirmed.

NOTE.—Reported in 103 N. E. 388. See, also, under (1) 5 Cyc. 758, 22 Cyc. 1030; (2) 5 Cyc. 754, 756; 22 Cyc. 1030; (3) 22 Cyc. 1034, 1043; (4) 22 Cyc. 1044; (5) 5 Cyc. 761, 762.

JENKINS v. STEELE.

[No. 8,041. Filed June 20, 1913. Reinstatement denied November 25, 1913.]

1. **APPEAL.—Jurisdiction.—Assignment of Errors.**—The assignment of errors constitutes the complaint on appeal and jurisdiction can only be acquired over the parties whose full names appear therein. p. 13.
2. **APPEAL.—Assignment of Errors.—Names Idem Sonans.—Dismissal.**—Lee Jenkins and Leroy Jenkins are not *idem sonans*, so that an assignment of errors in the name of Lee Jenkins, appellant, is insufficient to confer jurisdiction to decide questions relating to a judgment against Leroy Jenkins, and, no judgment appearing from the record against Lee Jenkins, a dismissal is required, especially where appellant's attention was called to the defective assignment and he made no effort within the year allowed for appeal to remedy the defect. pp. 14, 16, 18.

3. **APPEAL.—Dismissal.—Motion to Reinstate.**—A motion to reinstate an appeal after dismissal is recognized in the practice of this State. p. 14.
4. **APPEAL.—Assignment of Errors.—Defect.—Waiver.**—Although many irregularities and requirements concerning an appeal may be waived by appearance, or joinder in error, and by filing a brief on the merits, and some questions not properly presented are within the legal discretion of the court, there is no rule of waiver, or decision, whereby an appellant is entitled to a decision on the merits in the absence of a transcript of the record accompanied by an assignment of errors relating to the particular judgment shown by the record, and properly challenging its correctness. p. 15.
5. **APPEAL.—Assignment of Errors.—Failure to Set Out Names of Parties.**—Failure to set out in the assignment of errors the full names of all the parties to the judgment appealed from renders the assignment defective and unavailing. p. 16.
6. **APPEAL.—Defective Assignment of Errors.—Waiver of Right to Dismiss.**—An appellee, by failing to file a motion to dismiss and by filing a brief on the merits, does not waive the right to have the appeal dismissed where it appears that the assignment of errors is insufficient to present any question relating to the judgment shown by the transcript, and the court may order a dismissal on its own motion. pp. 17, 18.
7. **APPEAL.—Assignment of Errors.—Defect in Name of Parties.**—Where the assignment of errors showed “Lee” as the christian name of the appellant and the record showed that the judgment appealed from was against one with the same surname, but whose christian name was “Leroy,” there was no duty upon the appellee, in order to procure a dismissal, to show that the party named in the assignment was not the party against whom the judgment was rendered. p. 18.
8. **APPEAL.—Presumptions.—Duty to Show Error.**—On appeal every presumption is in favor of the lower court and it devolves on appellant to show affirmatively by the record that there is manifest error in the judgment shown by the record. p. 19.
9. **APPEAL.—Assignment of Errors.—Right to Amend.—Laches.**—The right to amend an assignment of errors does not exist after the year allowed by statute for perfecting an appeal has passed, and even if such right existed, where appellee’s brief calling attention to a defect in the assignment of errors was filed November 13, and the year allowed for perfecting the appeal did not expire until March 14, of the following year, appellant, who with full knowledge of the defect waited and took his chances, was guilty of such laches as to be deprived of the right to amend the assignment and to a reinstatement of the appeal after a dismissal. p. 19.

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10. COURTS.—*Jurisdiction.*—*Statutes.*—Courts cannot assume jurisdiction where it is not conferred, but are bound by valid statutes the same as individuals, nor can they arbitrarily ignore the rules of practice. p. 20.

11. APPEAL.—*Record.*—*Matters Dehors the Record.*—The appellate tribunal derives its knowledge of the proceedings and judgment from which the appeal is prosecuted from the duly authenticated transcript, and it may not go outside the record for such information. p. 20.

From Sullivan Circuit Court; *G. W. Buff*, Special Judge.

Action by Oliver Steele against Leroy Jenkins. From a judgment for plaintiff, the defendant appeals. *Appeal dismissed.*

Lee Fenton Bays and *Fred Fenton Bays*, for appellant.

Arthur D. Cutler, *Charles D. Hunt* and *Gilbert W. Gambill*, for appellee.

FELT, J.—Appellee recovered a judgment against Leroy Jenkins. The assignment of errors is entitled, *Lee Jenkins v. Oliver Steele*. Appellee has not filed a formal motion to dismiss the appeal but in his brief points out that the name of the appellant as given in the assignment of errors and in appellant's brief is different from that of the defendant named in the complaint and against whom the judgment appealed from was rendered. It is also pointed out that appellant has not complied with the rules of this court in setting out the pleadings and evidence or the substance thereof necessary to present the questions suggested by the assignment of errors, and that the errors, if any, are therefore waived.

The first objection affects the jurisdiction of this court. The assignment of errors constitutes the appellant's complaint in this court and jurisdiction can only be

1. acquired over the parties whose full names appear therein. In *Lilly v. Somerville* (1895), 142 Ind. 298, 40 N. E. 1088, the judgment appealed from was rendered against William G. Brackett and the assignment of errors was by Willard G. Brackett.

It was held that the assignment of errors was defective, that the appeal in the name of "Willard" presented no question affecting the judgment against

2. "William" and the appeal was dismissed. Lee Jenkins and Leroy Jenkins are not *idem sonans*. *Berkey v. Tipton Light, etc., Co.* (1908), 42 Ind. App. 301, 84 N. E. 1095, 85 N. E. 72; *Cleveland, etc., R. Co. v. Peirce* (1904), 34 Ind. App. 188, 72 N. E. 604; *Lilly v. Somerville, supra*; *City of Lafayette v. Wortman* (1886), 107 Ind. 404, 8 N. E. 277; *Vance v. State* (1879), 65 Ind. 460. The assignment of errors is clearly defective. This court cannot assume jurisdiction to decide questions relating to a judgment against Leroy Jenkins, on an assignment, or complaint, by Lee Jenkins. Such assignment raises no question affecting the judgment against Leroy Jenkins and the record shows no judgment against Lee Jenkins. Furthermore, appellant's attention was called to the defective assignment, by appellee's brief within the year allowed for appeal from the date of the judgment overruling the motion for a new trial and he took no steps either to obtain leave to correct the assignment of errors, or to perfect a new appeal within the year. The appeal is therefore dismissed.

MOTION TO REINSTATE CAUSE ON DOCKET.

FELT, J.—The appeal in this case was dismissed on June 20, 1913, and on August 19, following, a motion was filed by appellant asking to (1) reinstate the cause, (2) to grant permission to amend the assignment of errors by substituting the name of Leroy Jenkins for Lee Jenkins and for (3)

a decision on the merits of the case. Such motion is
3. recognized in our practice. *Elliott, App. Proc.* §537 *et seq.*; *Whisler v. Whisler* (1903), 162 Ind. 136, 140, 67 N. E. 984, 70 N. E. 152.

In the petition to reinstate, it is alleged that appellant was named Leroy at birth but has been and is known by the

name Lee, which is now his true name. The record and assignment of errors was filed May 22, 1911. Appellant's briefs were filed October 13, 1911, appellee's on November 13, 1911, and appellant's reply briefs on November 27, 1911. On page 2 of his original briefs, under the heading "Insufficiency of assignment of errors", appellee said: "The appeal herein should be dismissed for the reason that the assignment of errors is insufficient to challenge the judgment of the circuit court because: 1. The judgment in the court below was against Leroy Jenkins, and the assignment of errors names Lee Jenkins as the appellant. 2. Lee Jenkins, in the assignment, is not *idem sonans* with nor the same as, Leroy Jenkins, the judgment defendant." Following this statement the record was cited to show that the pleadings, entries and judgment were all in the name of Leroy Jenkins and decisions of the Supreme Court were cited and quoted to show that the assignment was insufficient to raise any question relating to the judgment against Leroy Jenkins, and that the appeal should be dismissed. In his reply brief appellant took the position that the assignment was sufficient and that appellee by filing his briefs had waived any objection thereto.

Under numerous decisions, the assignment is clearly defective and insufficient, but owing to the earnest insistence of appellant that the appearance and filing of briefs, waive all objections to an insufficient assignment of errors, we give further consideration to the question.

There are many irregularities and requirements that may be waived by an appearance, or joinder in error, and by the filing of a brief on the merits of the questions presented by the appeal. It is also true that some questions are within the legal discretion of this and the Supreme Court, but we know of no rule or decision that entitles a party to a decision on the merits of the controversy, where he has not brought to the court on appeal, a transcript of the record and an assignment of errors which

relates to the particular judgment shown by such transcript, and challenges its correctness in some way recognized by our appellate procedure. Ewbank's Manual §§198, 199, 200 and cases cited; Elliott, App. Proc. §§186, 187, 322, 323, 401-406, 522, 523.

Rule 6 of this court provides that the assignment of errors shall contain the full names of all the parties, and it has been uniformly held that a failure to set out

5. the full names of all the parties to the judgment appealed from, renders the assignment of errors defective and unavailing. The assignment of errors in

2. this court constitutes the appellant's complaint, and the court only acquires jurisdiction over the parties whose names appear therein. The merits of the appeal cannot be determined where the party in whose favor the judgment was rendered is not before the court, and in such case it is the duty of the court to dismiss the appeal upon its own motion. In *Snyder v. State, ex rel.* (1890), 124 Ind. 335, 24 N. E. 891, the Supreme Court by Mitchell, J., said: "The assignment of errors is the appellant's complaint, and the only parties before this court, or over whom it acquires jurisdiction, are those whose names appear therein." When a case is brought to an appellate tribunal, the first duty devolving on the court is to determine its own jurisdiction. If the assignment fails to present error relating to the judgment shown by the transcript, the court acquires no jurisdiction to decide any question except that relating to its own jurisdiction. The assignment of errors must be made by the identical party or parties against whom the alleged erroneous judgment was rendered and against the party or parties in whose favor such judgment was rendered. If the judgment below is against one person and the error is assigned by another and different person, the court acquires no jurisdiction over the person against whom the judgment was rendered, and it becomes the duty of the court to dismiss the

appeal whenever such want of jurisdiction is brought to its knowledge in any way. *Burke v. State* (1874), 47 Ind. 528; *Braden v. Leibenguth* (1890), 126 Ind. 336, 25 N. E. 899; *Gourley v. Embree* (1894), 137 Ind. 82, 36 N. E. 846; *Waldrup v. McConnell* (1908), 42 Ind. App. 54, 57, 84 N. E. 517; *Moon v. Cline* (1894), 11 Ind. App. 460, 464, 39 N. E. 432; *Hutts v. Martin* (1895), 141 Ind. 701, 41 N. E. 329; *Duncan v. Alderson* (1910), 46 Ind. App. 136, 92 N. E. 5; *Faulkner v. Baltimore, etc., R. Co.* (1909), 44 Ind. App. 441, 89 N. E. 511; *Berkey v. Tipton Light, etc., Co.* (1908), 42 Ind. App. 301, 84 N. E. 1095, 85 N. E. 724; *Pope v. Voigt* (1912), 49 Ind. App. 176, 96 N. E. 984.

The appellee does not, by failing to file a formal motion to dismiss the appeal, and by filing a brief on the merits of the case, waive the right to have the appeal dismissed

6. whenever it is made to appear that the assignment of errors is insufficient to present any question relating to the judgment shown by the transcript. In numerous decisions where the case has been briefed by both parties, the court on its own motion, without any suggestion from the briefs or otherwise, has dismissed the appeal on the ground that it did not have jurisdiction to decide questions relating to the merits of the controversy. In many cases where the appellee briefed the case on its merits, and no motion to dismiss was filed, the court has held that the only parties over whom the appellate tribunal obtains jurisdiction, are those whose names appear in such assignments, and where parties were omitted from, or defectively named in the assignment, the appeals have been dismissed. *City of South Bend v. Thompson* (1897), 19 Ind. App. 19, 49 N. E. 38; *Smith v. Holtz* (1901), 26 Ind. App. 692, 60 N. E. 728; *Big Four Bldg., etc., Assn. v. Olcott* (1896), 146 Ind. 176, 45 N. E. 64; *Barnett v. Bromley Mfg. Co.* (1897), 149 Ind. 606, 49 N. E. 160; *Bozeman v. Cale* (1894), 139 Ind. 187, 190, 35 N. E. 828; *Gourley v. Embree, supra*; *National, etc.,*

Assn. v. Huntsinger (1898), 150 Ind. 702; *Gunn v. Haworth* (1902), 159 Ind. 419, 421, 64 N. E. 911.

In *Whisler v. Whisler*, *supra*, 144, the court said: "As it was essential, in order to maintain the appeal in this cause, that all parties adverse to appellant should be named as appellees, the failure of appellant to comply with this requirement would necessarily have resulted in the dismissal of his appeal. * * * It is not the practice in this court for parties formally to demur to an assignment of errors, or to move to make such pleading more certain or specific; hence the assignment made must be treated and considered by the court as though it had been challenged by an appellant's adversary for deficiency therein. In considering the sufficiency of an assignment of errors all ambiguities or uncertainties therein will be construed against the pleading. The court can not indulge any presumptions, and thereby supply what the appellant by his pleading may have possibly or probably intended."

The assignment of error in the name of Lee Jenkins presents no question relating to the judgment against Leroy Jenkins. The court acquired no jurisdiction to decide the case on its merits, appellee, by filing a brief on the merits, did not waive any right relating to such defective assignment, or confer jurisdiction on the court which it did not have before such briefs were filed. The filing of a brief for appellee against Lee Jenkins did not give jurisdiction of Leroy Jenkins. This view is abundantly sustained by the authorities cited and makes it unnecessary for us to determine the effect of appellee's discussion in his original brief of the defective assignment, and his suggestion that the appeal should be dismissed.

Appellant now seeks by the motion to reinstate to show by matter *dehors* the record, and by certain evidence not set out in his original briefs, that Lee Jenkins is identical with Leroy Jenkins, and also contends that it was the duty of appellee to show that Lee Jenkins

was not the party against whom the judgment was rendered in the lower court. It is certain that no such duty rested on appellee. Every presumption is in favor of the

8. lower court and it devolves on the appellant to show affirmatively by the record that there is manifest error in the judgment shown by the transcript. Furthermore, in this case, the pleadings, order book entries, judgment, precipe and the certificate of the clerk show that the case tried in which the judgment was rendered is that of *Oliver Steele v. Leroy Jenkins*, and appellant admits that the title to the land, the sale of which gave rise to this lawsuit, was in the name of Leroy Jenkins.

Appellant had his attention called to the defective assignment, and knew that appellee was insisting that the appeal should be dismissed, at a time when he could have

9. asked to amend the assignment, or in some way could have perfected his appeal, or dismissed and taken a new appeal within the year allowed by the statute. The motion for a new trial was overruled March 14, 1911, and appellee's briefs were filed on November 13, of the same year. The year in which he could have asked to amend his assignment, or could have taken a new appeal, did not expire until March 14, 1912. With full knowledge of the defect, he voluntarily waited and took his chances. Under the decisions of our courts, and on principles of justice, he is guilty of laches, which would deprive him of the right he now seeks of amending his assignment. Furthermore, the statute limits the time for appeal to one year, and the decisions of our courts deny the right to amend an assignment of errors after that time has elapsed. Therefore it is not now in the power of this court to grant such right, for the amendment sought is vital and in effect the same as a new appeal. *Brown v. Brown* (1907), 168 Ind. 654, 656, 80 N. E. 535; *Pope v. Voigt*, *supra*; *Bozeman v. Cale*, *supra*; *Faulkner v. Baltimore, etc., R. Co.*, *supra*; *Raley v. Evansville Gas, etc., Co.* (1908), 43 Ind. App. 57, 86 N. E. 863.

The contention of appellant that the dismissal rests on technical grounds is not meritorious. Courts are bound by valid statutes as much as litigants and have no right

10. to violate the law and assume jurisdiction where it is not conferred. Many questions arise, which by a reasonable and liberal construction of the rules of practice, the courts may, and do decide on the merits, which might otherwise be disposed of on technical grounds. The question here is jurisdictional and to grant appellant the right to amend his assignment at this time, as requested, would be equivalent to granting a new appeal, which would be a violation of the statute and contrary to the established rules of practice and numerous decisions of both our courts of last resort. Courts cannot arbitrarily ignore the rules of practice. The rule requiring the assignment of errors to give the full names of all the parties affected by the judgment from which the appeal is taken, is a necessary and wholesome rule which expedites business and furthers the ends of justice. The duly authenticated transcript

11. gives the appellate tribunal its knowledge of the proceedings and judgment from which the appeal is prosecuted. From the very nature of the case, and by statute as well as by an unbroken line of decisions, courts are not permitted to go outside the record for such information, and to do so would open up a field of speculation and invite fraud that would take from judicial procedure, that security, certainty and confidence which is absolutely essential to the due administration of justice. For the reasons already announced, the motion to reinstate this cause on the docket of this court and to permit the assignment of errors to be amended, is overruled.

NOTE.—Reported in 102 N. E. 139, 103 N. E. 365. See, also, under (1) 2 Cyc. 980, 985; (2) 29 Cyc. 272; (3) 3 Cyc. 202; (4) 2 Cyc. 980, 1006; (5) 2 Cyc. 986; (6) 3 Cyc. 182, 191; (8) 3 Cyc. 275; (9) 2 Cyc. 1005; (10) 11 Cyc. 670; (11) 3 Cyc. 176.

McKINLEY ET AL. v. BRITTON ET AL.

[No. 8,353. Filed November 25, 1913.]

1. **PLEADING.—Theory.**—A pleading should proceed on a certain definite theory and its sufficiency must be determined on that theory. p. 24.
2. **PLEADING.—Theory.—Determination.**—The theory of a pleading must be determined by a consideration of its general scope and tenor, and the construction and theory adopted by the trial court will be adhered to on appeal, if it is susceptible to such construction and theory. p. 24.
3. **APPEAL—Review.—Pleading.—Theory.**—Where a pleading is reasonably open to two interpretations, that construction will be accepted on appeal which is in accord with and tends to sustain the ruling of the trial court on a demurrer to such pleading, unless the record shows that the lower court adopted the other theory. p. 24.
4. **APPEAL.—Harmless Error.—Ruling on Demurrer to Complaint.**—Sustaining a demurrer to a paragraph of complaint, if error, is harmless, where another paragraph proceeds on the same theory and imposes no additional burden in the matter of proof. p. 24.
5. **APPEAL.—Determination of Error.—Ruling on Demurrer.—Harmless Error.**—The court on appeal may look to the special finding of facts to determine if the ruling on a demurrer to a paragraph of complaint was prejudicial error; and where a paragraph remains under which the evidence admissible under the paragraph held bad was introduced, and there is a special finding of facts and conclusions of law and judgment based on such paragraph, the error in sustaining such demurrer will be deemed harmless. p. 25.
6. **APPEAL.—Review.—Presumptions to Support Judgment.—Theory of Complaint.**—Although appellant insists that a paragraph of complaint to which a demurrer was sustained was sufficient on the theory of an action to quiet title, where it was susceptible to the construction that it was on the theory of an action to set aside a deed on the ground of fraud and undue influence, it will be assumed that the demurrer was sustained because the trial court construed it as proceeding on the same theory as another paragraph seeking to have such deed set aside for fraud, and that the same evidence was necessary to a recovery under each paragraph, and the error, if any, was harmless in view of the fact that the finding shows that the evidence to support such theory was in fact admitted. p. 25.
7. **CANCELLATION OF INSTRUMENTS.—Ejectment.—Quieting Title.—Invalidity.—Remedy.**—The heirs of a deceased grantor, after dis-

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affirming her deed on the ground of fraud, could treat the conveyance as avoided by such disaffirmance and sue in ejectment or to quiet title, or proceed in equity to have the conveyance cancelled and the title reinvested in them as the heirs of such deceased grantor, and could in one action pursue each of such courses by separate paragraphs of complaint. p. 27.

8. JURY.—*Right of Trial by Jury.—Equitable Issues.*—In a suit to set aside a deed on the ground of fraud, a motion to submit the trial of the issues to a jury was properly overruled, since the action was in equity and the remedy sought is enforceable only by invoking the equitable powers of the court. p. 28.
9. JURY.—*Right of Trial by Jury.—Equitable Issues.*—When any essential part of a cause is exclusively of equitable cognizance, the right of trial by jury does not obtain, even though certain elements of an action at law may be incidentally involved. p. 28.
10. APPEAL.—*Review.—Harmless Error.—Ruling on Motion to Submit Cause to Jury.*—Where a motion to submit the cause to a jury for trial was joint and asked the submission of all the issues to the jury, the overruling of same was not available error, even though the issue tendered by one paragraph of complaint was triable by jury, where another paragraph presented a cause of equitable cognizance. p. 28.
11. APPEAL.—*Questions Reviewable.—Briefs.—Record.*—No available error is presented as to the admission and exclusion of evidence, where neither the pages nor the lines of the record where such evidence, or the exceptions, can be found, are pointed out in appellants' brief. p. 29.

From Boone Circuit Court; *Willett H. Parr*, Judge.

Action by Nancy McKinley and others against Walker M. Britton and another. From a judgment for defendants, the plaintiffs appeal. *Affirmed.*

Whittington & Williams and *Kennedy & Kennedy*, for appellants.

Crane & McCabe and *Samuel M. Ralston*, for appellees.

HOTTEL, J.—Appellants brought this action in the Montgomery Circuit Court, where, on November 14, 1901, they filed a complaint in three paragraphs. A demurrer filed to each of these paragraphs was overruled as to the first and third and sustained as to the second paragraph. The issues were closed by an answer in general denial. A trial by the court in June, 1902, resulted in a finding and judgment

for appellees. A motion for new trial was overruled April 23, 1903, and a new trial granted as of right on June 17, 1904. The venue was then changed to the Boone Circuit Court where a fourth paragraph of complaint was filed on October 14, 1909. A demurrer was sustained to this paragraph, after which the appellants filed the following motion, viz., "The plaintiffs in the above entitled cause respectfully move and request the court to call a jury to try the issues in said cause." This motion was overruled with exceptions in appellants' favor. Both parties requested a special finding of facts and conclusions of law. The trial was begun on October 15, 1909, and on the following day the third paragraph of complaint was dismissed. There was a special finding of facts and conclusions of law in appellees' favor. A motion for new trial filed by appellants was overruled and judgment rendered in accord with such findings and conclusions of law. From this judgment, appellants appealed.

The errors assigned and relied on for reversal, call in question the ruling on the demurrer to the fourth paragraph of complaint and the ruling on the motion for a new trial. We deem it unnecessary for the proper determination of the questions presented by the appeal to set out the several paragraphs of complaint. It is sufficient to say that it is claimed by appellees and conceded by appellants that the fourth paragraph proceeds on the theory of a suit in equity to set aside a deed on the ground of fraud and undue influence. The third paragraph, which was dismissed after the ruling on the demurrer to the fourth paragraph, and after the request for a trial of the issues by a jury, seeks to set aside the same deed on the ground that the grantor, under whom appellants claim as heirs, was of unsound mind, and incapable of acting with discretion and understanding in such matter at the time she made such deed and that the grantees, appellees, paid no consideration therefor.

In their presentation of the alleged error of the trial court in sustaining the demurrer to the fourth paragraph of complaint, appellants insist, in effect, that such paragraph was sufficient, both “as an action at law to quiet title” to the real estate involved, and as an action to set aside the deed under which appellees claim title to such real estate on the ground of fraud and undue influence. Such being appellants’ contention, the following general principles of law are applicable and controlling of the question involved:

- (1) “A pleading should proceed on a certain definite theory and its sufficiency should be judged and determined on that theory.” *Euler v. Euler* (1914), 55 Ind. App. 547, 102 N. E. 856 and authorities there cited.
- (2) The theory of a pleading must be determined by a consideration of its general scope and tenor,
 1. and the construction placed on it and the theory adopted by the trial court will be adhered to on appeal, where such pleading, from its plain terms, is susceptible of such construction and theory. *Euler v. Euler, supra*, and authorities there cited; *Flowers v. Poorman* (1908), 43 Ind. App. 528, 531, 87 N. E. 1007; *Lake Erie, etc., R. Co. v. McFall* (1905), 165 Ind. 574, 579, 76 N. E. 400.
 2. (3) Where a pleading is reasonably open to two interpretations, that construction will be accepted on appeal which is in accord with and will tend to sustain the ruling of the trial court on a demurrer to such pleading, unless the record shows that the lower court adopted the other theory. *Muncie Pulp Co. v. Martin* (1904), 164 Ind. 30, 32, 33, 72 N. E. 882, and authorities there cited; *Apperson v. Lazro* (1909), 44 Ind. App. 186, 196, 87 N. E. 97; 88 N. E. 99; Elliott, App. Proc. §§712, 720.
 3. (4) It is harmless error to sustain a demurrer to a paragraph of complaint where another paragraph is held sufficient which proceeds on the same theory and imposes no additional burden in the matter of proof over that required by the paragraph held insufficient.

Sanders v. Crawford (1907), 41 Ind. App. 245, 246, 83 N. E. 719, and cases there cited. (5) The appellate 5. tribunal may look to the special finding of facts in order to determine whether the ruling on a demurrer to a paragraph of complaint was prejudicial error. *Gilliland v. Jones* (1896), 144 Ind. 662, 668, 670, 43 N. E. 939, 55 Am. St. 210; *Vandalia R. Co. v. McAninch* (1908), 43 Ind. App. 221, 86 N. E. 1031; *Rohrof v. Schulte* (1899), 154 Ind. 183, 55 N. E. 427. (6) Where there is a paragraph of complaint, under which the evidence admissible under a paragraph to which a demurrer has been sustained was introduced and there is a special finding of facts and conclusions of law and judgment based on such paragraph, the sustaining of such demurrer will be harmless error. *Goodwine v. Cadwallader* (1901), 158 Ind. 202, 61 N. E. 939; *Conklin v. Dougherty* (1909), 44 Ind. App. 570, 572, 89 N. E. 893; *Sanders v. Crawford*, *supra*.

While appellants are now insisting that their fourth paragraph of complaint is sufficient as an action at law to quiet title, we think it apparent from its averments that

6. such was not the theory intended by the pleader.

If such was intended as its theory, the pleader has so burdened it with unusual and unnecessary averments as to completely obscure such theory and justify the court in determining its sufficiency on the theory herein indicated. The usual averments that the defendants, without right, are claiming and asserting some right, title or interest in the real estate involved, and that such claim is a cloud on plaintiff's title, are absent from such paragraph. True, such facts possibly may be inferred from other facts pleaded, but such other facts are pleaded by way of showing title in appellees under a deed which it is averred they procured from appellants' mother, by fraudulently and wrongfully taking advantage of their confidential relations with her, while acting as her confidential agents and advisors and that they thereby unduly and illegally influenced her to

make such deed to them, and that they refuse to reconvey such title. In their prayer, they ask that such deed be adjudged "illegal, invalid and void." Indeed appellants, as we have already indicated, are contending in this court that the averments of this paragraph are (we quote) "sufficient to make a *prima facie* case of the invalidity of the alleged deed on the ground of fraud and undue influence." They admit also that the first paragraph proceeds on the same theory. It follows that the second and third propositions of law above announced require us to assume that the trial court sustained the demurrer to such paragraph of complaint because it construed it as proceeding on the same theory as the first paragraph and concluded that the same evidence was necessary to a recovery under each of such paragraphs. The finding of facts in the case shows that the evidence admissible under such theory of such complaint was in fact admitted, and hence under principles Nos. 4 and 5 announced, the error, if any, in sustaining the demurrer to said paragraph on such theory was harmless.

It is insisted by appellants that the harm resulting to them from this ruling becomes apparent when we consider the character of the evidence that would have been admissible had the court treated such paragraph as an action at law to quiet title, and held it sufficient on such theory. In this connection, it is contended by appellants, in effect, that if said paragraph had been held sufficient on such theory, that they, in the introduction of their evidence, could have simply shown title to the real estate involved, in their deceased mother, at the time of her death and that they were her heirs, and rested their case; and that when appellees introduced their deed, they could have followed with evidence showing that the grantor therein was of unsound mind when the deed was executed; that, by the sustaining of said demurrer, the appellants were deprived of the advantage of any evidence on the subject of the unsoundness of mind

of such grantor, because "the remaining part of the action, * * * was a suit to set aside the deed for fraud and undue influence and nothing more." In support of this contention appellants rely on the case of *Brown v. Freed* (1873), 43 Ind. 253, and the case of *Freed v. Brown* (1876), 55 Ind. 310.

It seems to be well settled that the rule in this State permitted the appellants, after their disaffirmance of the deed as alleged in both the first and fourth paragraphs of 7. their complaint, to elect to pursue either one of two courses, viz., (1) to treat the conveyance as having been avoided by such disaffirmance and sue in ejectment or to quiet title; or (2) to proceed in equity to have the conveyance cancelled and the title reinvested in them as the heirs of the deceased grantor, Jane Britton. *Monnett v. Turpie* (1892), 133 Ind. 424, 32 N. E. 328; *Monnett v. Turpie* (1892), 132 Ind. 482, 32 N. E. 328, and cases there cited; *Muncie Pulp Co. v. Martin* (1904), 164 Ind. 30, 32, 72 N. E. 882; *Flint & Walling Mfg. Co. v. Beckett* (1906), 167 Ind. 491, 79 N. E. 503, 12 L. R. A. (N. S.) 924; *Krise v. Wilson* (1903), 31 Ind. App. 590, 592, 68 N. E. 693. It is also true as appellants contend that they had the right in separate paragraphs of the same complaint to pursue each of said courses. And, if appellants had a complaint, the separate paragraphs of which proceeded on such separate theories, their contention would be supported by authority, but the trouble with appellants' complaint is that both of the paragraphs proceed on the last theory, or at least were open to such construction. We might, as a further answer to appellants' contention say, that the ruling on said demurrer when made, did not deprive them of said evidence of unsoundness of mind of said grantor in said deed, for the reason that their said third paragraph of complaint had not then been dismissed, and it expressly tendered such issue. Upon this proposition the case of *Sanders v. Crawford, supra*, is especially in point. So that viewed

from any standpoint, the authorities herein cited conclusively show that no available error is presented by the court's ruling on the demurrer to the said fourth paragraph of complaint.

No error resulted from overruling appellant's motion to submit the trial of the issues to a jury, because it is admitted by appellants that this first paragraph of

8. complaint proceeds (we quote from appellants' brief)

“upon the theory of an action to set aside a pretended deed executed by Jane Britton deceased, to appellees, Walter and Frank Britton, purporting to convey to them all of her real estate, on the ground that said pretended deed was procured by fraud.” Such an action is one in equity and the remedy sought can be enforced only by invoking the equitable powers of the court, and the rule is that when-

ever any essential part of a cause is exclusively of

9. equitable cognizance, the right of trial by jury does not obtain, even though certain elements of an action

at law may be incidentally involved. *Monnett v. Turpie, supra; Martin v. Martin* (1888), 118 Ind. 227, 20 N. E. 763; *Towns v. Smith* (1888), 115 Ind. 480, 16 N. E. 811; *Stix v. Sadler* (1886), 109 Ind. 254, 9 N. E. 905; *Carpenter v. Willard Library* (1900), 26 Ind App. 619, 60 N. E. 365; *McCoy v. Oldham* (1890), 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. 208.

The theory of the first paragraph of complaint being admitted to be as above stated, it is not necessary to determine whether the third paragraph, which was before the

10. court when this motion was overruled, was triable by jury, for the reason, that the motion as before indi-

cated, was joint and asked the submission of all the issues to the jury, and hence no available error resulted from overruling it if either paragraph of the complaint presented a cause of action of equitable cognizance. *Cincinnati, etc., R. Co. v. Cregor* (1898), 150 Ind. 625, 627, 50 N. E. 670;

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Sievers v. Peters, etc., Lumber Co. (1898), 151 Ind. 642, 50 N. E. 877; 52 N. E. 399; *Jones v. Peters* (1901), 28 Ind. App. 383, 386, 62 N. E. 1019.

The first five grounds of appellants' motion for a new trial attempt to present certain rulings of the trial court in the admission and exclusion of evidence. Neither

11. the pages nor the lines of the record where such admitted or excluded evidence or the exceptions thereto can be found, are anywhere pointed out in appellants' brief. While other reasons might be given for holding that such grounds of the motion for new trial present no available error, the giving of them is rendered unnecessary by the omission in appellants' brief indicated. *Providence, etc., Ins. Co. v. Wolf* (1907), 168 Ind. 690, 704, 80 N. E. 26, 120 Am. St. 395; *Indiana, etc., R. Co. v. Ditto* (1902), 158 Ind. 669, 672, 64 N. E. 222; *Ellison v. Ryan* (1908), 43 Ind. App. 610, 612, 87 N. E. 244; *Tyler v. Davis* (1905), 37 Ind. App. 557, 571, 75 N. E. 3.

A careful examination of the finding of facts in this case and of the evidence set out in the respective briefs convinces us that the merits of the cause have been fairly tried, and finding no available error in the record harmful to appellants, the judgment below is affirmed.

NOTE.—Reported in 103 N. E. 349. See, also, (1) 31 Cyc. 84; (2) 2 Cyc. 672; 31 Cyc. 84; (4) 31 Cyc. 358; (6) 3 Cyc. 286; (8) 24 Cyc. 117; (9) 24 Cyc. 113; (10) 38 Cyc. 1936; (11) 2 Cyc. 1015. As to cancellation of instruments notwithstanding defense at law, see 9 Am. St. 859. As to the right to a jury trial in an action to quiet title, see 3 Ann. Cas. 248; 18 Ann. Cas. 245.

OHIO FARMERS INSURANCE COMPANY v. GEDDES.

[No. 8,110. Filed November 26, 1913.]

1. APPEAL.—*Assignment of Errors.—Briefs.*—No question is presented by the assignments that the court erred in sustaining a demurrer to a plea in abatement, in overruling a demurrer to a complaint, and in the conclusions of law, where neither the demurrers and the pleadings to which they were addressed, nor the substance of either, nor the special finding of facts, conclusions of law, and the motion for new trial are set out in appellant's brief. p. 31.

From Allen Circuit Court; *Carl Yapple*, Judge.

Action by George Geddes against the Ohio Farmers Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Robert B. Dreibelbiss, Lee Elliott and H. I. Smith, for appellant.

Colerick & Hogan, for appellee.

SHEA, J.—Appellee brought this action against appellant in the court below on a fire insurance policy issued by the latter covering certain buildings then alleged to have been owned by appellee, in Adams County, Indiana. Appellant challenged the right to maintain the action in Allen County instead of Adams County by plea in abatement. Appellee's demurrer to said plea was sustained. Appellant then filed a demurrer to the amended complaint which was overruled. The cause was tried by the court, and upon proper request a special finding of facts was made and conclusions of law stated thereon. Judgment was rendered in favor of appellee for \$650.

It is assigned that the court erred: (1) in sustaining appellee's demurrer to appellant's plea in abatement; (2) in overruling appellant's demurrer to the complaint; (3) in its conclusions of law numbered one and two. Appellee very urgently insists that the errors relied on for a reversal are not properly presented by appellant's brief, in accord-

ance with Rule 22 of this court, therefore no question is presented for determination to this court.

This cause was tried upon an amended complaint, and error in overruling the demurrer thereto is relied on for a reversal. Neither the amended complaint nor the 1. demurrer, nor the substance of either is set out or even referred to in appellant's brief. A plea in abatement was filed, to which a demurrer was sustained. The substance of the plea in abatement is not sufficiently set out, and no attempt is made to set out the demurrer or the substance thereof. The special findings of fact, conclusions of law, and the motion for a new trial are not set out in appellant's brief, either in form or substance. There is no attempt made to conform to Rule 22 in the arrangement of the brief. Although the question as to the sufficiency of the brief to conform to the rule was directly presented by appellee's brief filed November 27, 1911, no effort was made to amend appellant's brief until April 7, 1913, when a motion then filed was overruled by the court. The court cannot overlook a brief in such condition. No question is properly presented. The judgment is therefore affirmed.

NOTE.—Reported in 103 N. E. 349. See, also, 2 Cyc. 1014-1016.

ILLINOIS SURETY COMPANY v. STATE OF INDIANA,
EX REL. BRACKEN.

[No. 8,098. Filed November 26, 1913.]

1. PLEADING.—*Complaint.—Initial Attack on Appeal.*—The sufficiency of separate paragraphs of complaint cannot be questioned for the first time on appeal, but the question must be raised by demurrer and exception and be presented on appeal by assigning error on the ruling on such demurrer. p. 34.
2. TRIAL.—*Motion for Peremptory Instructions.—Waiver of Error.*—Defendant by offering evidence in his behalf and proceeding in the trial to verdict and judgment, after the overruling of a mo-

tion for peremptory instruction, waives the error, if any, in the overruling of such motion. p. 35.

3. **APPEAL.**—*Review.*—*Verdict.*—*Answers to Interrogatories.*—Where it appears from the record that an action for damages caused by the unlawful sale of liquor was submitted to the jury on two paragraphs of complaint, one of which proceeded on the theory that the license was issued to John S. and that the saloon was run by him and his agents, and the other alleged that the license was issued to James S. under the name of John S., answers by the jury to interrogatories showing that the license was issued to John S. and that he and James S. were separate individuals, are not in irreconcilable conflict with a general verdict for plaintiff. pp. 35, 36.
4. **APPEAL.**—*Questions Reviewable.*—*Motion for Judgment on Answers to Interrogatories.*—In considering a motion for judgment on the jury's answers to interrogatories the court on appeal looks only to the pleadings, the general verdict, and the interrogatories and answers thereto. p. 36.
5. **TRIAL.**—*Verdict.*—*Answers to Interrogatories.*—Answers that are contradictory nullify each other, and they are also unavailing unless the conflict between them and the general verdict is such that it cannot be explained or removed by any evidence admissible under the issues. p. 36.
6. **APPEAL.**—*Questions Reviewable.*—*Assignment of Errors.*—No question is presented for review on appeal by the assignment that the verdict is not sustained by sufficient evidence, or that it is contrary to law, but such questions should be presented as grounds for a new trial. p. 36.
7. **INTOXICATING LIQUORS.**—*Unlawful Sales.*—*Action for Damages.*—*Evidence.*—*Sufficiency.*—In an action on a retail liquor dealer's bond for damages caused by the unlawful sale of intoxicating liquor, evidence showing that a license was duly issued to defendant in 1908 for the place where the alleged sale was made, that defendant's brother had acted as manager of the saloon for defendant from June, 1908, to some time in 1909 subsequent to the alleged sale, together with the testimony of the bartender that he was employed by defendant and that defendant's brother managed the saloon for defendant, was sufficient to warrant the jury in finding that the saloon was run under the license issued to defendant and was being operated by his agents at the time of the alleged sale. p. 36.
8. **APPEAL.**—*Review.*—*Verdict.*—*Evidence.*—Where there is some evidence to support a verdict it is sufficient on appeal, since the court cannot weigh conflicting evidence. p. 37.

From Superior Court of Marion County (82,229);
Charles J. Orbison, Judge.

Illinois Surety Co. v. State, ex rel.—55 Ind. App. 31.

Action by the State of Indiana, on the relation of Caroline Bracken, against the Illinois Surety Company and others. From a judgment for relatrix, the defendant surety company appeals. *Affirmed.*

Elmer Wetzel, for appellant.

Emsley W. Johnson, Orval E. Mehring and B. F. Watson, for appellee.

FELT, J.—This is a suit by the State of Indiana on the relation of Caroline Bracken, against appellant to recover on the bond of a retail liquor dealer for damages caused by alleged illegal sales of intoxicating liquors to the minor son of the relatrix which resulted in his death.

From a judgment in favor of appellee, appellant has appealed and assigned as error that: “(1) The second paragraph of complaint does not state facts sufficient to constitute a cause of action against Illinois Surety Co. (2) The court erred in overruling appellant’s motion for peremptory instructions to the jury to find for appellant at the conclusion of evidence of relatrix in the cause. (3) The verdict of the jury is not sustained by sufficient evidence. (4) The verdict of the jury is contrary to law. (5) The court erred in overruling appellant’s motion for judgment in its favor on the answers of the jury to interrogatories, notwithstanding the general verdict. (6) The court erred in overruling appellant’s motion for new trial.”

The complaint was answered by separate general denials filed by appellant and James M. Scanlan. John V. Scanlan was named as defendant but was not served with process, and did not appear. The gist of the first paragraph of complaint is that on July 7, 1908, a retail liquor license was duly issued to John V. Scanlan by the board of county commissioners of Marion County, Indiana; that appellant was his surety on the statutory bond given to secure said license, which was to run for the term of one year from June

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24, 1908, and authorized the sale of intoxicating liquors in a certain building at the southwest corner of Kissel Avenue and 38th Street in the city of Indianapolis; that on June 5, 1909, said Scanlan was conducting a saloon and engaged in the sale of intoxicating liquors at said place "under and pursuant to authority granted him by said license"; that "defendant Scanlan, by himself and agents," sold on said date, repeatedly, to one Roy Bracken, intoxicating liquors, which were drunk by him and caused him to become intoxicated; that about eleven o'clock at night said Scanlan, and his agents then and there conducting said saloon for him, put said Bracken out of the saloon; that he was at the time so intoxicated as to be helpless and irresponsible; that soon thereafter, while in said condition, caused by the liquors so sold to him as aforesaid, he wandered onto the tracks of the Indiana Union Traction Company, about a quarter of a mile east of said saloon and was struck by a car and so injured that he died from the effects of his injuries on the following morning; that at the time of his death he was a minor seventeen years of age and the son of the relatrix; that she was a widow and he lived with her and was her only support; that he was strong and industrious and contributed \$5 per week to her support. The bond was by exhibit made part of the complaint and was in the usual form of such instruments. The second paragraph of the complaint is substantially the same as the first, except it names as defendants, the appellant, John V. Scanlan and James M. Scanlan alias John V. Scanlan and avers that the license was issued to James M. Scanlan under the name of John V. Scanlan.

The first assignment of error seeks to question the sufficiency of the second paragraph of complaint for the first time in this court. Where there is more than one

1. paragraph of complaint, the sufficiency of separate paragraphs cannot be questioned for the first time

on appeal. Such assignments must be predicated on the complaint as an entirety. To test the sufficiency of separate paragraphs the question must be raised by demurrer and exception to the ruling in the court below, and be presented on appeal by assigning as error the overruling of such demurrer. *Board, etc. v. Tichenor* (1891), 129 Ind. 562, 565, 29 N. E. 32; *Petrie v. Ludwig* (1907), 41 Ind. App. 310, 312, 83 N. E. 770; *Indianapolis St. R. Co. v. Bolin* (1907), 41 Ind. App. 266, 268, 78 N. E. 210, 83 N. E. 754; *Ewbank's Manual* §§284-286.

As to the second alleged error it is sufficient to note that the motion for a peremptory instruction was made by appellant at the close of plaintiff's evidence. The mo-

2. tion was overruled and appellant thereupon offered evidence in its behalf and the trial proceeded to verdict and final judgment. By such further proceedings after the motion was overruled, the error, if any, in such ruling, was waived. *City of Greenfield v. Johnson* (1902), 30 Ind. App. 127, 130, 65 N. E. 542; *Elliott*, App. Proc. §687.

The jury, in addition to returning a general verdict, returned answers to interrogatories in substance as follows:

That John V. Scanlan was not in reality James M.

3. Scanlan, under an alias, when said license was obtained in 1908; that John V. Scanlan did not in June, 1908, "in his own proper person make application for and receive a license to sell intoxicating liquors" at the place described in the complaint; that appellant, in July, 1908, executed a bond in the sum of \$2,000 as surety for one John V. Scanlan, who had been granted a license to sell intoxicating liquors at the place aforesaid; that John V. and James M. Scanlan are brothers. Each defendant moved for judgment on the answers to the interrogatories notwithstanding the general verdict. It was shown that James M. Scanlan did not obtain the license or execute the bond in suit and as to him the motion was sustained. The motion

of appellant was overruled and judgment was rendered against it on the general verdict.

Appellant contends that the case was tried on the second paragraph of complaint only, and that the answers showing that the license was issued to John V. Scanlan and that he and James M. Scanlan were separate individuals, are in irreconcilable conflict with the general verdict. The record shows that the cause was submitted to the jury on both paragraphs of the complaint. The first paragraph proceeds on the theory that the license was issued to John V. Scanlan and that the saloon was run by him and his agents under said license when the liquor was sold to decedent as alleged.

In considering the motion for judgment on the answers of the jury to the interrogatories, we are to look only to the pleadings, the general verdict and the interrogatories

4. and answers thereto. If the answers are contradictory, they nullify each other and have no effect. To avail the appellant, the conflict must be such, that it
5. could not have been explained and removed by any evidence admissible under the issues. The answers are not in irreconcilable conflict with the general
3. verdict, but are in harmony with a verdict on the first paragraph of complaint, which as already shown, was not withdrawn or abandoned. *Grass v. Fort Wayne, etc., Traction Co.* (1908), 42 Ind. App. 395, 400, 81 N. E. 574; *Inland Steel Co. v. Smith* (1906), 168 Ind. 245, 80 N. E. 538.

The third and fourth assignments present no question but the causes there alleged are grounds for new trial and appear in appellant's motion and are presented by

6. the sixth assignment of error. Appellant contends that there is no evidence to show that the saloon was being operated by John V. Scanlan or his agents
7. under the license issued in July, 1908, at the time of the alleged sales to decedent in June, 1909. The license and bond show that the license was duly issued to

John V. Scanlan for the place where the alleged sales were made. James M. Scanlan testified in substance, that since June, 1908, he had acted as manager of said saloon for John V. Scanlan until a time in 1909, subsequent to the alleged sales. Joe Gates, a bartender in the saloon at the time the alleged sales were made, testified that he was employed by John V. Scanlan and that James M. managed the saloon for John Scanlan; that he worked for John V. Scanlan in said saloon in 1908 and 1909 and that John came out to the saloon two or three times a week during part of the time. The evidence was sufficient to warrant the jury in finding that the saloon was run under the license issued to John V. Scanlan in 1908, and that it was operated by his agents at the time of the alleged sales to the decedent. Where

8. there is some evidence to support the verdict, it is sufficient, on appeal, for it is neither the duty nor right of this court to weigh conflicting evidence. There is no available error shown by the record. Judgment affirmed.

NOTE.—Reported in 103 N. E. 363. See, also, under (1) 31 Cyc. 720; (3) 38 Cyc. 1927-1929; (4) 38 Cyc. 1930; (5) 38 Cyc. 1926; (6) 29 Cyc. 747; (7) 23 Cyc. 324; (8) 3 Cyc. 348. As to liability of liquor seller and bondsmen under civil damage laws, see 48 Am. Dec. 625; 85 Am. St. 449.

NUNN v. STATE OF INDIANA.

[No. 8,636. Filed December 9, 1913.]

1. PARENT AND CHILD.—*Neglect of Children.—Findings.*—A finding of facts showing that defendant was a married woman, the mother of two children under fourteen years of age, that her husband was employed in another town, that during his absence she visited wine rooms until late at night and brought a man home with her on several occasions, and had sexual intercourse with him for hire until a late hour in a room near where her young children were, and on one occasion had sexual intercourse with him while her seventeen-year-old daughter was having such intercourse with another man in the same room, and that she practically made a house of prostitution of her apartments, was

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sufficient to show that defendant's children were neglected, and that she contributed to their neglect, within the meaning of §§1643, 1645 Burns 1908, Acts 1907 p. 59, defining a neglected child and providing for the punishment of any person who encourages, counsels or contributes to the neglect of a child. p.39.

From Juvenile Court of Marion County (7,402a) ; *Newton M. Taylor*, Judge.

Prosecution by the State of Indiana against Dora Nunn. From a judgment of conviction, the defendant appeals. *Affirmed.*

Harvey G. Hargrove, for appellant.

Thomas M. Honan, Attorney-General, and *Thomas H. Branaman*, for the State.

IBACH, J.—Dora Nunn was convicted in the Marion Juvenile Court of neglecting and contributing to the neglect of her children under the age of sixteen years, the action being based upon §1645 Burns 1908, Acts 1907 p. 59. She appeals to this court, under §1635 Burns 1908, Acts 1907 p. 221. It is asserted that the decision of the court is contrary to law in that the facts found by the court do not sustain the judgment.

A neglected child, as defined by §1643 Burns 1908, Acts 1907 p. 59, is “any boy under the age of sixteen (16) years or any girl under the age of seventeen (17) years, who has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill-fame, or with any vicious or disreputable persons; or who is employed in any saloon; or whose home by reason of neglect, cruelty or depravity on the part of its parent or parents, guardian or other person in whose care it may be, is an unfit place for such child; or whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship.” Section 1645 Burns 1908, Acts 1907 p. 59, provides that “When any child is found to be * * * neglected as defined by sections 1 and 2 [§1643, *supra*] of this act, the parent, parents, person or persons

having the care, custody or control of such child, or any other person, who is or are responsible for, or who by any act or omission of duty encourages, counsels or contributes to the neglect of such child, or who, by reason of wilful neglect of any duty owing by said parent or parents, person or persons to such child, is or are responsible for its neglect," shall be deemed guilty of a misdemeanor, and upon conviction in a juvenile court, shall be punished in a manner specified.

The facts found by the court show that appellant is a married woman, and she and her husband are the parents of two children under the age of fourteen; that she

1. lives in Indianapolis, while her husband is working in Muncie; that her husband can only occasionally visit his family, but furnishes all necessary provision for their support; that soon after her husband went to Muncie to work, appellant began to visit wine rooms and to stay out late at night at such places away from her home and her small children; that at one of such wine rooms she met a man named Allen, drank intoxicating liquor with him, and then went to a room with him and spent the greater part of the night in immoral practices; that afterwards Allen began to visit her in her home, and would stay there late at night, engaging in sexual intercourse with her in a room in her apartment near where her children were sleeping; that he sometimes went there in the daytime and she would send the children away and engage in immoral practices with him; that on one occasion, she permitted Allen to bring another man with him to her apartment adjoining that in which her small children were, and she engaged in sexual intercourse with him and the other man engaged in sexual intercourse with her seventeen-year-old daughter, all in the same room at the same time; that she practically made a house of prostitution of her home where her small children were living under her care and custody, and received money from Allen for her immoral conduct,

which she continued until shortly before the trial of this cause.

These facts speak for themselves and conclusively show, that appellant's children were neglected, and that she contributed to their neglect, within the meaning of the statute. She was not giving them proper parental care, for by her depravity their home became an unfit place for them, and they were virtually living in a house of ill-fame, with disreputable persons.

Judgment affirmed.

NOTE.—Reported in 103 N. E. 439. See, also, 22 Cyc. Anno. 525; 29 Cyc. 1676.

**THE CRAWFORDSVILLE TRUST COMPANY, EXECUTOR,
ET AL. v. RAMSEY.**

[No. 7,922. Filed February 20, 1913. Rehearing denied June 26, 1913. Transfer denied December 9, 1913.]

1. **WILLS.—Election by Widow.—Action.—Appeal.—Time for Perfecting.**—An action by the widow of a testator, in which no issues were tendered involving any question as to her right to share in the estate as widow, but in which the questions were whether she should be bound by her election to take under the will, and whether deceased in his lifetime had made a valid transfer and assignment of certain stocks and bonds so that they were no part of his estate at the time of his death, is not in any way affected by the decedents' estates act, and hence §§2977, 2978 Burns 1908, §2454 R. S. 1881, Acts 1899 p. 397, providing that on appeal from a judgment growing out of a matter connected with a decedent's estate the transcript must be filed within one hundred days after rendition of the judgment, are not applicable. p. 60.
2. **WILLS.—Judgment of Invalidity.—Effect.**—Where a will has been declared void in its entirety, it is void as to all persons interested therein, including testator's widow notwithstanding she had previously elected to take thereunder. p. 62.
3. **APPEAL.—Dismissal.**—An appeal may be dismissed as to a portion of the appellants where such dismissal will not affect the others. p. 62.
4. **APPEAL.—Dismissal.—Settlement of Controversy.**—An appeal will be dismissed where it is properly and conclusively made to

appear that the litigation has been in some manner ended and disposed of so as to render unnecessary the determination of the questions presented. p. 62.

5. **APPEAL.—Dismissal.—Determination of Costs.**—An appeal will not be entertained for the sole purpose of determining who should pay the cost of the litigation. p. 63.
6. **APPEAL — Dismissal — Want of Actual Controversy.**—Where, pending an appeal to the Appellate Court from a judgment for plaintiff in an action by a widow involving the question of whether she was bound by her election to take under the will, and questions incident thereto, as well as the validity of certain assignments made by testator, the Supreme Court affirmed a judgment declaring the will void, the questions involved, except as to the validity of the assignments, were thereby eliminated and a dismissal of the appeal is required as to those appellants having no interest in the remaining question. p. 63.
7. **GIFTS.—Causa Mortis.—Inter Vivos.**—In the case of a gift *causa mortis* the title does not pass immediately, but the gift is conditional in that it can take effect only on the death of the donor, who in the meantime can revoke it, but to constitute a valid gift *inter vivos*, it is essential that the article given should be delivered absolutely and unconditionally, so as to take effect at once and completely, and where one intends a gift *inter vivos* through the instrumentality of an agent, the agent must have performed what was incumbent upon him to make the transfer complete during the donor's lifetime, or the gift fails; hence an assignment of stocks and bonds and the delivery of same to the secretary of a trust company to be cared for until the donor's death, when they were to be delivered to certain trustees, of whom the trust company was one, and made without knowledge or acceptance by either of the trustees during the donor's lifetime, did not constitute a gift *inter vivos*. p. 66.
8. **GIFTS.—Inter Vivos.—Special Findings.**—Special findings that a donor at the time of making an alleged gift was suffering from an incurable disease and knew that death was near, that the gift was made in expectation of death from such disease, and that it was conditioned on that event, are inconsistent with a gift *inter vivos*. p. 68.
9. **GIFTS.—Inter Vivos.—Conditions.**—It is not necessary that the condition that the property shall not pass until the death of the donor be expressly stated in order to invalidate the gift as one *inter vivos*, but it is sufficient if the condition is implied. p. 68.
10. **GIFTS.—Inter Vivos.—Evidence.—Sufficiency.**—On the question of the validity of a gift *inter vivos*, a showing that the subject of the gift was assigned in blank with a reference to donor's will as furnishing the purpose and terms of the gift, and was delivered to

the secretary of a trust company with instructions to care for same, that such secretary understood that the donor had retained the income from such gift, that he failed to say anything about the transaction to the trust company or the board of county commissioners, who were designated in the will as trustees to receive the property given, and that shortly before donor's death such secretary procured from him a second assignment, etc., is insufficient to show an intention to make an irrevocable gift. pp. 69, 70.

11. GIFTS.—*Inter Vivos*.—*Burden of Proof*.—One taking under a voluntary settlement or gift, containing no power of revocation, has the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable. p. 69.
12. HUSBAND AND WIFE.—*Power of Husband to Defeat Wife's Interest in Estate*.—*Wills*.—*Gifts Causa Mortis*.—Where testator, after executing his will containing a bequest of stocks and bonds to trustees for charitable purposes, on learning that his wife could defeat the trust by electing to take under the statute instead of under the will, and while afflicted with a fatal malady, executed an assignment of such stocks and bonds in blank, with a reference therein to his will for the terms and purposes of the assignment, and delivered the same to the secretary of a trust company which was designated in the will as one of the trustees, to be cared for by such secretary, but without any knowledge or acceptance by either of the trustees, and thereafter while *in extremis* executed a new assignment in which he retained the income of the stocks and bonds during life, the transaction was testamentary in character rather than of the nature of a gift *inter vivos*; but, regardless of its character, it was not binding on the widow, since, while a husband as a general rule may do as he pleases with his personal property, he cannot at the approach of death give it away for the purpose of defeating his wife's rights under the statute. pp. 70, 77.
13. TRIAL.—*Findings*.—*Conclusions of Law*.—Where the issues involved were as to the validity of an assignment of stocks and bonds made by plaintiff's husband while *in extremis* for the purpose of effectuating the provisions of his will creating a charitable trust, and as to plaintiff's right as widow to take her one-third in the property assigned, a finding of facts showing the assignment invalid was sufficient to warrant a conclusion that plaintiff is entitled to her distributive share as widow in the property involved in such assignment. p. 73.
14. TRIAL.—*Findings*.—*Conclusions of Law*.—Where the facts found in a special finding lead to but one conclusion or result, the deduction is a conclusion of law and not an ultimate fact. p. 74.
15. HUSBAND AND WIFE.—*Gift by Husband to Defeat Wife's Interest in Estate*.—*Fraud*.—A finding of fraud as a fact was not

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essential to authorize a conclusion of law that a decedent's widow was entitled to her distributive share in property involved in a gift or assignment made by him with a view to defeating her rights as a widow. p. 74.

16. **APPEAL.—Review.—Ruling on Motion to Retax Costs.**—Where there was no judgment for appellants on any issue involved, and no motion for any such judgment, no available error is presented on the overruling of a motion to retax costs. p. 74.

17. **HUSBAND AND WIFE.—Assignment by Husband to Defeat Wife's Interest in Estate.—Evidence.—Admissibility.**—In a widow's action to set aside an assignment of stocks and bonds made by her husband for the purpose of defeating her rights as widow, the admission of evidence of plaintiff to the effect that she did not see the instrument, which was executed only two days before his death, was proper as bearing on the question of decedent's mental condition. p. 74.

From Clinton Circuit Court; *Jos. Combs*, Judge.

Action by Ice H. Ramsey against The Crawfordsville Trust Company, as executor of the will of Alexander F. Ramsey, deceased, and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Guenther & Clark, Crane & McCabe and Finley P. Mount, for appellants.

Thomas & Foley, Samuel M. Ralston, Harry C. Sheridan and Kennedy & Kennedy, for appellee.

HOTTEL, J.—This action is based upon a complaint of five paragraphs covering about sixty printed pages. Answers and replies correspondingly long and a special finding of facts with conclusions of law extending over sixty-four printed pages were also filed in the case. This, with a record containing over 4,000 pages of evidence, and numerous separate assignments of error by many appellants, make it extremely difficult to present, in an opinion of reasonable length, a statement of the issues, the findings and the evidence that will intelligently present the several questions to be determined. However, this labor has been materially lessened by a recent decision of the Supreme Court in the case of *Crawfordsville Trust Co. v. Ramsey* (1912), 178

Ind. 258, 98 N. E. 177, which, for the reasons hereinafter indicated, has eliminated one branch of the case and a number of questions incident thereto.

There is no dispute between the parties as to certain general facts upon which the several pleadings are based, and which are found by the finding and shown by the evidence. These facts are necessary to an understanding of the questions with which this opinion will have to deal, and we now set them out. Alexander F. Ramsey, for many years a resident of the city of Crawfordsville, Montgomery County, Indiana, died testate at Hot Springs, Arkansas, on March 11, 1907, leaving surviving him, a widow, Ice H. Ramsey, the appellee; a son, Charles P. Ramsey, and a daughter, Hepsey B. Yount, as his only heirs. The decedent was twice married before his marriage to appellee. The first and second marriages were each dissolved. He married appellee January 13, 1883. The son and daughter were children by his second wife. At the time of his death, decedent had accumulated a considerable fortune and during his life had made three wills. The first will was made June 11, 1894, the second, August 25, 1906, and the last, February 5, 1907. In each of these wills the decedent provided for a fund to be known as the "A. F. Ramsey Relief Fund for the Poor of Crawfordsville, Indiana." For the purposes of the questions to be determined in this opinion, the provisions of the several wills may be treated as being the same in each will, except that in the last will the decedent added to the poor fund forty "One thousand dollar bonds" of the "Indianapolis, Crawfordsville and Western Traction Company" which were of the value of \$24,000, together with all the stock which he held in that company which was of no value, and instead of devising the stocks and bonds to the board of commissioners of said county alone as trustee, as in his former wills, he devised such stocks and bonds to such board of commissioners and their successors in office, and to the Crawfordsville Trust Company of Crawfordsville,

Indiana, jointly as trustees. At the time of the making of the second will, the decedent signed and acknowledged a quitclaim deed conveying to his wife two pieces of business property in the city of Crawfordsville of the probable value of \$15,000 and the annual income from which was \$1,680. This deed, was not delivered to the wife until in January or February, 1907. Each of the wills devised the real estate known as the home place to appellee for life and at her death to go to the daughter Hepsey B. Yount. Certain other real estate was devised to her for life and at her death to the trustees of said poor fund. The decedent organized the Citizens National Bank of Crawfordsville, Indiana, in 1883 and was elected its president and held such position until his death. In the year 1889, he organized the Crawfordsville Trust Company, became one of its stockholders and directors, was elected its president and sustained such relations to said trust company until his death, and made the office of such company his principal place of business. Walter F. Hulet was the secretary of such trust company during a great part of this period. About the year 1905, Ramsey with others organized the "Indianapolis, Crawfordsville and Western Traction Company" known as the "Ben Hur Line," for the purpose of building an interurban road from Crawfordsville to Indianapolis and at the time of such organization became a stockholder and director and was elected and remained its president until his death. After making his last will, Ramsey obtained information that the trust fund therein created could be diminished by his widow electing to take under the law instead of taking under the will and he then, on February 21, 1907, prepared, signed and delivered to Mr. Hulet an instrument of assignment assigning to the same trustees the same stocks and bonds which he had in his will given to such trustees and at the same time prepared, signed and delivered another instrument of assignment assigning other and additional shares of bank stock. These deeds of assignment referred to the

provisions of the will as furnishing the purpose for which the trust was created and providing the manner of its management and control. On March 9, 1907, two days before the death of Mr. Ramsey, Mr. Hulet was in Hot Springs, Arkansas, and at that time the decedent signed and delivered to him another deed of assignment for the same stocks and bonds before assigned. Said assignments of said stocks and bonds and each of them were without any consideration. On March 20, 1907, the appellee executed an election in writing to take under the will of her deceased husband and March 22, 1907, caused it to be filed in the office of the clerk of the Montgomery Circuit Court and recorded in the will record of that court. Hepsey B. Yount, as a consideration for the filing of the election, conveyed to appellee by quitclaim deed the real estate in Crawfordsville known as the home place in which appellee had been given a life estate by the will of her deceased husband. Said deed contained the following provisions, viz., "And the said grantee by accepting this deed waives all her rights in and to the estate, both real and personal, of which the said Alexander F. Ramsey died seized, wherever situate, excepting only those rights and interests saved and secured unto her by the terms of said will, and which said will was probated in the Montgomery Circuit Court on the 16th day of March, 1907. Provided always, that this conveyance is upon the express condition that the will of Alexander F. Ramsey, deceased, shall not be set aside, broken and held for naught at any time by the judgment of any court, then this deed shall in all respects be void." On March 25, 1907, appellee by an instrument in writing, duly signed and acknowledged, revoked her election to take under the will and elected to take as the widow of her deceased husband and therein accepted the provisions made for her by the statute and law of descent of the State as such widow, which instrument was filed by her on said day with the clerk of said court and was by such clerk recorded in the will records of said county, and

appellee on said day caused to be served on said trust company trustee, notice in writing of her intention to rescind and revoke her said election made on March 20, and that she had filed her election to take under the law, and on said day signed, acknowledged and tendered to Hepsey B. Yount a quitclaim deed for said home place, being the same real estate before mentioned herein as being conveyed by Hepsey B. Yount to appellee. In January, 1906, decedent was taken ill, was threatened with pneumonia and was under the care of a physician, and in the latter part of February, an examination of his urine disclosed that he was suffering from acute Bright's disease. On August 28, 1906, the decedent, accompanied by his wife and family physician went to Mountain Valley Springs, Arkansas, to recuperate his health. He arrived at the Springs, September 1 and remained until December 20, 1906, when he returned to his home in Crawfordsville. His illness grew worse and on February 26, 1907, he, in company with his wife and a colored servant went to Hot Springs, Arkansas, to get the benefit of the waters of that city, and there died on March 9, 1907. The decedent, on each of the occasions when he made the assignments of the stocks and bonds above referred to, and for sometime prior thereto, knew the character of his illness, knew that it was fatal and that he had but a short time to live. After this suit was filed, Hepsey B. Yount died leaving a husband and three minor children. Said trust company was appointed administrator of her estate, and guardian of her minor children and as such it and the husband of Hepsey B. Yount were substituted as defendants.

As the question of the sufficiency of the several pleadings is not presented, we need only indicate their general scope and tenor. The first paragraph of the complaint sets out the will of the decedent, the appellee's election to take thereunder, her after revocation and asking to have her election set aside and that she be permitted to take under

the law. The paragraph proceeds upon the theory that the appellee, at the time she made her election, was suffering from nervous strain, worry and grief, resulting from the recent illness and death of her husband and on account thereof was not in a frame of mind to understand and act intelligently. The second paragraph differs from the first in that it also sets out the deed made by Hepsey B. Yount above referred to as furnishing the consideration for appellee's election and avers that when she accepted the same and made her election, she thought she was getting a good deed and title to her home place and that she could sell the same at any time and make a good deed to the same; that in executing said election and accepting the deed she did so without knowing or understanding the legal effect of her husband's will or the legal effect of the other instruments; that she tendered back to Hepsey B. Yount a deed to the premises, a copy of which is set out in the complaint. She asks to have both the deed and election set aside and canceled and that her revocation of the election be confirmed and that she be allowed to take under the law. The third paragraph differs from the second in that it contains additional averments relating to the assignment of the stocks and bonds above referred to as made by the decedent on March 9, 1907; it sets out the assignment and alleges in effect that the signature of the decedent to it was procured by Hulet while acting in his own interest and in the interest of the trust company for the fraudulent purpose of securing the control of the stocks and bonds for himself and for the company, and to prevent appellee from inheriting an interest therein; that when said instrument of assignment was signed by the decedent and delivered to Hulet, he did not have either the stocks or bonds in his possession, and did not deliver the possession thereof to the trust company or board of commissioners, and that the instrument was neither delivered nor accepted by said trustees or either of them during the life of the decedent. In this paragraph

the appellee asked to have the revocation of her election confirmed that she be permitted to take under the law, that her election and the deed to her from Hepsey B. Yount be canceled and annulled and her husband's assignment of said stocks and bonds be declared void and set aside. The fourth paragraph differs from the third in that it alleges that appellee's election was secured by certain fraudulent representations made by Hulet. The fifth paragraph in its main features is the same as the fourth.

The administrator of the estate of Hepsey B. Yount, her husband and the guardian of her children, filed a special answer to each of the paragraphs of the complaint in which they admit all the essential facts with reference to the execution of the several instruments mentioned therein and aver that the decedent, Hepsey B. Yount, was interested in seeing that her father's will should be carried out and the trust fund therein provided for, allowed to stand, and desired her property separated from the appellee's, and that for this reason she made the deed to appellee mentioned in the complaint; that her brother Charles was a wayward son and her father feared that he would make trouble, and contest his will, and might thereby defeat the father's intent and purpose with reference to such trust fund; that to prevent such a result and at the same time to furnish appellee with a ready income in case the son did contest his will, he made a deed to appellee conveying to her a life estate in certain real estate before mentioned herein and on February 21, 1907, made the assignments of the bank stocks and bonds before mentioned herein, and at the same time turned over and delivered such stocks and bonds with said assignments to the Crawfordsville Trust Company, trustee; that the executor of the will of Ramsey, delivered other stocks and bonds to Hepsey B. Yount, residuary legatee, which she assigned after appellee had elected to take under the will, and before her revocation was filed;

that Hepsey B. Yount never herself made or authorized any one to make for her any representations to appellee to secure her to make said election, but that such election was made by appellee with a full knowledge of all the facts, etc.

The Crawfordsville Trust Company filed a special partial answer to the third, fourth and fifth paragraphs of complaint in which it alleges that on February 21, 1907, the decedent then being the owner of the stocks and bonds mentioned in the complaint, transferred and assigned the same to said trust company and its codefendant, the board of commissioners of Montgomery County, and endorsed and delivered to said trust company each of the 160 shares of bank stock, and delivered each of the bonds which were each payable to bearer; that the trust company took and received the certificates and shares of stocks and bonds from the decedent and has ever since owned and held exclusive possession thereof; that concurrently with the delivery to the trustee of said stocks and bonds, Ramsey made, executed and delivered to such trust company instruments in writing in evidence thereof, that the will mentioned in each of said instruments is the same as that admitted to probate on March 16, 1907, and the same as that set forth in each of the paragraphs of complaint, and that such will was on February 21, 1907, in the possession of said trust company and so remained in its possession until it was probated. It claims that its right in such stocks and bonds is superior to that of any other person and asks judgment for costs. The trust company as executor also filed a separate answer in which it set up the assignments of February 21, 1907, and averred substantially the same facts contained in the answer filed by the heirs of Hepsey B. Yount.

The plaintiff replied in nine paragraphs to the trust company's partial answer, the first of which alleges that on February 21, 1907, when said instruments of assignment were signed, and for weeks prior thereto, decedent was afflicted with a fatal disease and was then in his last illness

and in danger of dying at any time, which facts were well known by him; that the transfer of said stocks and bonds was colorable only and was made for the purpose of preventing the appellee from receiving her share and interest therein as widow at a time when the decedent "had in mind and in contemplation his early demise." The second paragraph of reply is, in all essential respects, the same as the first with additional averments alleging in substance that at the time of the making of the assignments of February 21, 1907, it was understood and agreed between the decedent and said trust company that during the life of decedent, it should collect and pay over to him all the income of said stocks and bonds so assigned, the purpose of the decedent being "to retain for himself during his life the income therefrom and to deprive the plaintiff of any interest or share in such stocks and bonds after his death." The third paragraph avers about the same facts as the first and that the decedent executed the assignments for the fraudulent purpose and design of depriving the plaintiff of her statutory rights in said stocks and bonds, in case she survived him. The fourth paragraph alleges that at the time of the execution of said instruments of assignment, the decedent was of unsound mind. The fifth paragraph avers that the 160 shares of bank stock were not transferred on the books of the bank until after the death of Ramsey, and that such bank was organized under and pursuant to the national banking laws of the United States. The reply asks that the decedent be adjudged the owner of such stock at the time of his death. The sixth paragraph sets up the enfeebled mental and physical condition of the decedent, and avers the existence of a confidential relation between the decedent and the trust company and its officers and agents, and that such company for the purpose of getting control of said property and to prevent appellee from getting any interest therein upon the death of said Ramsey betrayed its relation of confidence

and trust and induced the decedent to make the assignment without appellee's knowledge or consent, and that the same was not the free will act of decedent. The seventh paragraph avers that the decedent with the assistance and advice of Hulet, the secretary of the trust company, obtained legal advice to the effect that his will of February 5, would not prevent the appellee from taking her share in the trust fund, and that for the purpose of depriving appellee of her interest therein, in case she survived him, the decedent with the aid, assistance and advice of said Hulet made the assignments with the understanding and agreement that all the interest and income therefrom was to be paid to said Ramsey during his life; that such assignments were made without any consideration and in contemplation of death, the decedent at the time believing he would live but a few days. The eighth paragraph was substantially the same as the seventh except it averred more in detail the facts and circumstances leading up to the assignments. The ninth paragraph was a general denial.

Upon the issues so presented, the cause was submitted to the court for trial with a request for a special finding of facts. The court made such finding and therein found the general facts to be substantially as before set out in this opinion. This finding also set out the contents of the last will of decedent, and the several instruments of assignment made by him, and found the facts leading up to and connected with the making of the last will and assignments. Many of the facts found are evidentiary in character but we here set them out to avoid repetition in discussing the sufficiency of the evidence. The facts are substantially as follows: Decedent on February 1 and 2, 1907, at the office of the appellant trust company, in the city of Crawfordsville, took up with its secretary, Walter Hulet, the matter of rewriting his will, made August 25, 1906, and indicated to Hulet certain conditions which he desired to make therein and requested him to take such will to his

attorney, Finley P. Mount, and request him to rewrite it, incorporating therein such desired changes. Hulet pursuant to such request, took the will to Mount and informed him of decedent's desires and instructions with reference thereto, and furnished him with written memoranda of the changes the decedent desired made therein. The attorney, acting upon the instructions so received, prepared a will incorporating therein the provisions of the will of August 25, 1906, with the changes directed by decedent and delivered the draft thereof to the decedent at his home on February 4, 1907, and on the following day decedent took the same to the office of said trust company and there signed the same in the presence of witnesses. This will was left with said trust company and a few days later, about February 18, the decedent, in a conversation with Hulet, spoke of the relief fund provided for in his will and stated that no one could disturb it, to which remark Hulet replied in effect that he thought such fund might be diminished by an election of the widow to take under the law instead of accepting the terms of the will. Decedent expressed the belief that Hulet was mistaken, but when Hulet insisted that his statement was correct, decedent requested him to go to Benjamin Crane, an attorney, and ask him his opinion as to whether Mrs. Ramsey, in the event she should take under the law, would take one-third of the personal property embraced in the "A. F. Ramsey Relief Fund" provided for in the will of February 5, 1907. Hulet procured the opinion of the attorney and at once reported to decedent at his home that upon his death, his widow, in case she took under the law, could take the one-third of said relief fund, to which the decedent replied that he could fix that. On February 21, 1907, the decedent went to the trust company and obtained from his private box in the safety deposit vault of such company all of his certificates of stocks of the Citizens National Bank and all of the bonds of the Indianapolis, Crawfordsville and Western Traction Com-

pany, which he then had in his possession, there being twenty-six of such bonds of \$1,000 each, together with the interim certificate representing all of his stock in said traction company, and decedent then and there assigned in blank the printed form on the back of each of such bank stock certificates, four in all, and representing 100 shares of such bank stock. These certificates are identified in the finding by number and the number of shares of stock represented by each certificate is indicated. The blank assignment on the back is also set out. Decedent then delivered the shares of stock so assigned in blank to Hulet as secretary of said trust company and at the same time delivered to him twenty-six of the \$1,000 bonds of the Indianapolis, Crawfordsville and Western Traction Company identified in the finding by their number, each of which bonds was payable to bearer and at the same time gave Hulet instructions with reference to the payment of a note which decedent owed the Fletcher National Bank of Indianapolis and directed him upon the payment of the same to procure from such bank fourteen other \$1,000 traction company bonds held by said bank as collateral security for the payment of the note, said bonds being payable to bearer (identified by number in the finding) and to deliver such bonds to said trust company. Decedent also at this time delivered to Hulet the interim certificate representing all the shares of stock held by him in said traction company and his written instrument of assignment of all of said stocks and bonds which reads as follows:

“This is to certify that I have this day assigned to the Board of Commissioners of Montgomery County, Indiana, and their successors in office, and The Crawfordsville Trust Company, jointly in trust, the following certificates of the Capital Stock of the Citizens National Bank, to wit: Ctf. No. 90 for 50 shares of stock; Ctf. No. 135 for 30 shares of stock; Ctf. No. 117 for 4 shares of stock and Ctf. No. 55 for 16 shares of stock; the said stock of the Citizens National Bank of Crawfordsville, Indiana, being transferred and delivered

to the Crawfordsville Trust Company in lieu of the one hundred (100) shares of the Capital Stock of said Bank willed and bequeathed to them in my will dated February 5th, 1907, and *to be for the same purpose as that stated in my said will and to be subject to the same conditions and management as set out in full in my said will.* I have, also, this day assigned to said Board of Commissioners and said Trust Company and delivered to the said The Crawfordsville Trust Company all my stocks and bonds in the Indianapolis, Crawfordsville and Western Traction Company numbered as follows, to wit: Nos. 66-69-70-71-72-73-74-75-76-77-79-80-81-173-534-535-536-537-538-539-540-541-542-543-544-545-546 - 547-548-549-550-551-552-553-554-555-556-557-558—the said stocks and bonds being transferred and delivered to The Crawfordsville Trust Company in lieu of the said stocks and bonds willed and bequeathed to them in my will of Feb. 5th, 1907, *all of which is for the same purpose as stated and set out in my said will and subject to the same conditions and management as set out in my said will''.*

The stocks and bonds covered by this instrument of assignment are the same stocks and bonds set forth and described in the will of February 5, 1907.

Concurrently with the execution of the instrument of assignment just set out and the delivery of the stocks and bonds mentioned therein, decedent also assigned by signing his name to the printed form on the back, the following additional certificates of the capital stock of the Citizens National Bank of Crawfordsville, to wit, certificate No. 119 for thirty shares, and certificate No. 70 for thirty shares, and then and there delivered the same to said Hulet as secretary of said trust company, and he at the same time signed and delivered a separate instrument of assignment for said sixty shares of said stock which is in the words following:

“I hereby assign and transfer to the Board of Commissioners of Montgomery County, Indiana, and their successors in office, and The Crawfordsville Trust Company of Crawfordsville, Indiana, jointly in trust, the following certificates of the capital stock of the Citizens National Bank of Crawfordsville, Indiana, to wit:

Ctf. No. 70 for thirty shares of stock and Ctf. No. 119 for thirty shares of stock and have delivered it to The Crawfordsville Trust Company for it to be added to and become a part of the fund set apart for the relief of the poor known as the 'A. F. Ramsey Fund' in addition to the one hundred (100) shares of stock of said bank willed and bequeathed to said fund in my will dated February 5, 1907, and afterwards assigned and transferred to said Board of Commissioners and Crawfordsville Trust Company *for the same purpose as that stated and set out in my will and to be subject to the same conditions and management as stated in said will.*"

Hulet as secretary of said trust company placed all of said instruments so delivered to him except said traction bonds in an envelope and wrote on such envelope the words "A. F. Ramsey Relief Fund" and made a package of said traction bonds and wrote thereon the words "Bonds assigned to County Commissioners and The Crawfordsville Trust Company" and thereupon placed all of said papers in the vault of said trust company. About March 1, 1907, Hulet, pursuant to instructions of decedent before referred to, collected a note due decedent and on March 4, 1907, with a part of the proceeds of the note so collected paid the \$7,000 note due from decedent to the Fletcher National Bank and took up the fourteen \$1,000 traction bonds held by that bank as collateral security and these bonds were added to the package before mentioned containing the other twenty-six of such bonds.

"At the time of the execution of said instruments of assignment said instruments and said 160 shares of bank stock and the forty bonds of said Indianapolis and Crawfordsville and Western Traction Company were taken possession of by said Walter F. Hulet as secretary of the Crawfordsville Trust Company with directions from said Ramsey to take care of them." (Our italics.) Said certificates of bank stock were at said time endorsed in blank by decedent, signing his name on the back thereof, without naming any assignee

therein or thereon and neither said bank stock nor the stock of said traction company was transferred on the books of the respective corporations, and said assignments were made *“by the said Ramsey with the intent and for the purpose of preventing his wife, as his widow, from taking any part thereof under the law of the State of Indiana, and at a time when he knew he was afflicted with a fatal disease as the result of which he knew that his death would shortly ensue, and in anticipation thereof.”* (Our italics.) At the time decedent executed the assignment, he expressed to Hulet the belief that they were all right but stated that if they were not he would make them so.

Afterwards and prior to March 9, 1907, Hulet was advised by Benjamin Crane that it would be better if the assignments contained all the terms and conditions of said trust expressed in the will and referred to by reference in each assignment, said attorney giving as his reason for such advice that if the will should become lost or destroyed, the trustee would “have no written direction or instruction for the administration of said trust.” Thereupon the attorneys Crane and Mount prepared another instrument of assignment and gave it to Hulet advising him to take it to decedent at Hot Springs, Arkansas, and have him sign and execute it. On March 9, 1907, Hulet called on decedent at Hot Springs, Arkansas, and gave to him the assignment so prepared by Crane and Mount and stated to decedent that said attorneys had expressed the opinion that it would be better if the assignment contained all the terms of the trust expressed in the will and decedent expressing satisfaction with such suggestion and a willingness to execute the new assignment, Hulet procured a notary public to come to the rooms of decedent and he, decedent, then and there, to wit, on March 9, 1907, in the presence of Hulet, such notary public and a colored servant, signed and executed said separate instrument of assignment and delivered the same to Hulet, who took and received the same on behalf of The Crawfordsville

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Trust Company trustee as in said instrument named and designated, which instrument of assignment was in the words and figures following:

“I hereby assign and transfer and deliver to the Board of Commissioners of the County of Montgomery and State of Indiana, and their successors in office and The Crawfordsville Trust Company of Crawfordsville, Indiana, jointly in trust, for the uses and purposes hereinafter set forth, the following personal property.”

The finding here sets out such personal property being the same stocks and bonds before assigned. The finding also sets out the provisions of the assignment as to the purposes, terms and conditions of the trust and all directions and provisions as to its custody and management by the trust company and the manner of administering the income by the board of commissioners and these are all substantially if not identically the same as contained in the will of February 5, 1907, with the additional provision following:

“Provided, however, the said The Crawfordsville Trust Company shall during my lifetime collect and pay over to me all of the income of the property hereby assigned. Also provided further, that this assignment shall be deemed an ademption of the legacy to the said trustee in my will dated Feb. 5, 1907, so far as the same pertains to the Capital Stock of the Citizens National Bank of Crawfordsville, Indiana, and the Stocks and Bonds of The Indianapolis, Crawfordsville & Western Traction Company and no further.”

The finding then proceeds in substance as follows: It was the intention and purpose of Ramsey in the execution of this assignment of March 9, 1907, to embody in the written assignment of the stocks and bonds the terms and conditions of the trust upon which the trustees named were to hold the same and the same was made as aforesaid, for no other purposes whatsoever. The Crawfordsville Trust Company and its secretary, Walter F. Hulet, in submitting the assignment of March 9, 1907, to Ramsey for execution and in procuring the execution thereof and in accepting the same

from Ramsey had no other purpose or intention in relation thereto than to protect the interests of the trust company by having the instrument of assignment of said stocks and bonds embody and set forth the terms and conditions of the trust upon which the same were to be held without having to resort to any other instrument for such terms and conditions. Soon after signing and delivering to Hulet the assignment of March 9, the decedent became much weaker and suddenly died on March 11.

The intent and purpose of Ramsey in the execution of the two instruments of assignment of February 21, 1907, and the separate instrument of assignment of March 9, 1907, as hereinbefore found, and in the delivery of the same to Walter F. Hulet, as secretary of the The Crawfordsville Trust Company, as trustee of the stocks and bonds therein described and as herein found, were to prevent his wife, appellee, from taking her statutory interest in his personal property, described in said instruments of assignment. Each and all of the instruments of assignment were made without any consideration whatever, at a time when Ramsey was suffering from an incurable disease and well knew that he could live but a short time, and were made by him a short time before and in expectation of death as a result of said disease, *and were conditional on that event and would not have been made had not Ramsey been suffering from said disease and soon expected to die therefrom.* Each and all of the assignments were made secretly by said Ramsey, without the knowledge or consent of his wife. Prior to the death of Alexander F. Ramsey, neither the board of directors of the trust company nor the board of commissioners of Montgomery County, took any official action whatever in relation to the property mentioned and included in said instruments of assignment of February 21, 1907, and of March 9, 1907, and prior to his death, neither said board of directors nor said board of commissioners had any knowledge whatever of the execution of either of said instruments, and the possession

of said instruments was taken by Hulet and held by him until after the death of Ramsey without any knowledge on the part of the said trust company, or its agents and officers, other than Hulet and Finley P. Mount, and without any knowledge on the part of the board of commissioners and without any authority whatever of any of the trustees, and no act of acceptance was taken by any of the trustees, under and by virtue of any of said instruments of assignment prior to the death of Ramsey.

Upon these findings the court stated conclusions of law favorable to appellee and rendered judgment accordingly. Separate and joint motions for new trial were made by the several appellants which were overruled and exceptions properly saved. Among the numerous errors assigned by the several appellants, that of The Crawfordsville Trust Company which presents the correctness of the several conclusions of law on the facts found, and the ruling on the motion for a new trial and a motion to retax costs are all that, for the purposes of this opinion, need be indicated.

We are first confronted with a motion by appellee to dismiss this appeal on the ground that the judgment appealed from is one growing out of a matter connected with a

1. decedent's estate and that the transcript of the appeal was not filed in this court within 100 days after the judgment appealed from was rendered as required by §§2977, 2978 Burns 1908, §2454 R. S. 1881, Acts 1899 p. 397. Many cases are cited by appellee, some of which contain expressions that lend apparent support to her contention, but a careful examination of these and other cases upon the same subject, convinces us that said §§2977, 2978, *supra*, do not cover cases of the character here involved. These sections apply only in those cases where the judgment appealed from was rendered in a suit or proceeding under the provisions of the decedents' estates act. *Browning v. McCracken* (1884), 97 Ind. 279; *Bennett v. Bennett* (1885), 102 Ind. 86, 1 N. E. 199; *Galentine v. Wood* (1893), 137 Ind.

532, 35 N. E. 901; *Harrison Nat. Bank v. Culbertson* (1896), 147 Ind. 611, 614, 45 N. E. 657, 47 N. E. 13; *Walker v. Steele* (1889), 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; *Mason v. Roll* (1891), 130 Ind. 260, 29 N. E. 1135; *Mark v. North* (1900), 155 Ind. 575, 57 N. E. 902; *Baker v. Edwards* (1900), 156 Ind. 53, 59 N. E. 174; *Roach v. Clark* (1897), 150 Ind. 93, 48 N. E. 796, 65 Am. St. 353. The decedents' estates act expressly forbids the bringing of a suit against an executor or administrator by complaint and summons except in suits on the bond of such administrator or executor, and then in certain cases and for certain causes only. §§2828, 2829, 2981 Burns 1908, Acts 1883 p. 151, §§2311, 2458 R. S. 1881. The statute of descents is no part of the decedents' estates act. And, in any event, the general tenor of the pleadings and the facts before set out in this opinion conclusively show that the issues tendered did not involve any question as to appellee's being the widow of the decedent or as to her right to a share in his estate as such widow but the questions were: (1) whether she should be bound by her election as such widow to take under the will instead of under the law; (2) whether the decedent in his lifetime had made a valid transfer and assignment of certain stocks and bonds and thereby parted with the title of the same so that they represented no part of his estate when he died. The only thing that stood in the way of appellee's obtaining the one-third interest in all the property of her deceased husband to which she was entitled as his widow, was the several assignments and transfers of stocks and bonds by her husband in his lifetime, and her own election to take under his will, and, incidentally, the deed made to her by Hepsey B. Yount as consideration for said election. If she could secure the cancellation of these several instruments, there was then no controversy as to what her rights in her husband's estate would be, under the law. The entire gravamen of the action was the cancellation and setting aside of said several instruments, and the relief asked was wholly

equitable. An appeal from a judgment in such cases is under the code and not under the decedents' estates act. *Baker v. Edwards, supra*; *Roach v. Clark, supra*; *Heller v. Clark* (1885), 103 Ind. 591, 3 N. E. 844. Under these authorities the original motion to dismiss the appeal is overruled.

Since the appeal of this case, the Supreme Court of this State, as before indicated, has decided the case of *Crawfordsville Trust Co. v. Ramsey, supra*, which was an appeal from a judgment setting aside the will of Alexander F. Ramsey. The judgment of the trial court setting aside such will was affirmed by the Supreme Court, and we are now asked to dismiss the appeal as to all appellants except the trustees of said trust. A reference to our statement of the facts in this case and the general scope and tenor of the issues are sufficient to indicate that one branch of this appeal, and all questions incident thereto, have been disposed of by the affirmation of the judgment in the will case. While the ap-

2. pellee did not bring the suit to contest her husband's will, yet such will having been declared void in its entirety in that suit, it is void as to all persons interested therein, including the widow who may have elected to take thereunder. The widow no more than any one else can take under a void will. *Floyd v. Floyd* (1883), 90 Ind. 130, 134; *Leach v. Prehster* (1872), 39 Ind. 492, 498, 499. The provision in the deed from Hepsey B. Yount to appellee set out in our statement of facts shows that it was to be rendered of no effect by a successful contest of the will of Alexander

F. Ramsey. An appeal may be dismissed as to a

3. portion of the appellants without affecting others.

Miller v. Arnold (1879), 65 Ind. 488; *Vordermark v. Wilkinson* (1896), 147 Ind. 56, 46 N. E. 336; *Chicago, etc., R. Co. v. Grantham* (1905), 165 Ind. 279, 282, 75 N. E. 265, and authorities there cited. Where it is properly and con-

4. clusively made to appear to the appellate court that litigation pending in such court has been in some

manner ended and disposed of so as to render unnecessary the determination of the questions involved in the appeal, such appeal will be dismissed. *Dunn v. State* (1904), 163 Ind. 317, 320, 71 N. E. 890; *Stauffer v. Salimonie Min., etc., Co.* (1896), 147 Ind. 71, 73, 46 N. E. 342; *Princeton Coal, etc., Co. v. Gilmore* (1907), 170 Ind. 366, and cases cited at 369, 370, 83 N. E. 500; *Rowe v. Bateman* (1899), 153 Ind.

633, 54 N. E. 1065, 55 N. E. 754, and cases cited. An

5. appeal will not be entertained for the sole purpose of determining who should pay the cost of the litigation. *Dunn v. State, supra*; *Stauffer v. Salimonie Min., etc., Co., supra*; *Hale v. Berg* (1907), 41 Ind. App. 48, 52, 83 N. E. 357, and cases cited. From these propositions of law,

6. it follows that the question of the effect and validity of appellee's election and her revocation of such election, as well as the validity of the deed made to her as consideration therefor and all questions incident thereto, have been eliminated by the decision of the Supreme Court in the case of *Crawfordsville Trust Co. v. Ramsey, supra*, and that this appeal should be dismissed as to all the appellants except The Crawfordsville Trust Company as executor of the last will of Alexander F. Ramsey, deceased, The Crawfordsville Trust Company, trustee of the A. F. Ramsey Relief Fund for the Poor of Crawfordsville, Indiana, and the Board of Commissioners of the County of Montgomery, trustee of said "Relief Fund."

The only remaining questions relate to the validity of the assignments of the stocks and bonds made by the decedent in his lifetime. This question is presented by the exception to the third and fifth conclusions of law. These conclusions are as follows: "(3) That the several instruments of assignment executed by the decedent Alexander F. Ramsey on February 21, 1907, and March 9, 1907, for one hundred and sixty shares of the capital stock of the Citizens National Bank of Crawfordsville, Indiana, and forty one thousand dollar bonds, and the capital stock of The Indianapolis, Craw-

fordsville and Western Traction Company, to The Crawfordsville Trust Company, of Crawfordsville, Indiana, and the Board of Commissioners of Montgomery County, Indiana, joint trustees, are each and all separately and severally void and of no effect as against the claim of this plaintiff as the widow of Alexander F. Ramsey to her distributive share in the estate of the said Ramsey. (5) That the plaintiff is entitled to her distributive share as the widow of Alexander F. Ramsey, under the statute of Indiana, in the personal property included in the assignments of February 21, 1907, and of March 9, 1907, made by the said Alexander F. Ramsey on said dates, and composed of one hundred and sixty shares of the Capital Stock of the Citizens National Bank of Crawfordsville, Indiana, and Forty One Thousand Dollar Bonds, and the Capital Stock of the Indianapolis, Crawfordsville and Western Traction Company, and that the executor and trustee of said Ramsey should be required to account to her for the same."

In support of the finding of the court on this branch of the case and its conclusions of law thereon it is insisted by appellee: (1) That a bequest to the poor people of Crawfordsville is indefinite and uncertain, and that the trust provision of the will and in the instruments of assignment is void because of the indefiniteness of the beneficiaries; (2) that the trustees named in the will of A. F. Ramsey and in the instruments of assignment are not vested with discretion to select the beneficiaries of the charity from the class named therein and that where a trust created by will for a charitable purpose names no specific beneficiary and gives the trustee no discretion to select such beneficiary, the trust cannot be judicially enforced and is void; (3) the provision of the relief fund is void because against public policy in that the creation of such fund in the form and manner prescribed in the will and instruments of assignment would result in making Crawfordsville the resort of the "indolent, drunken and worthless"; (4) such provision is in violation of the terms

of the statute of Indiana relating to perpetuities; (5) that “after the enjoyment of his property in the most absolute manner during almost his entire life the law will not permit a husband, afflicted with a fatal illness, in anticipation of his early demise and with a view of defeating his surviving widow’s statutory right in the property under §3025 Burns 1908, Acts 1891 p. 404, to give it away. Especially will the law not permit this to be done where the deed of gift is conditioned on the event of the husband’s death or where the husband reserves for life the income of the property.”

The questions raised by the first and second propositions announced by appellee would require us to set out in detail the provisions of the will or of the assignment of March 9, 1907, relating to the purposes of said trust fund and its management and control by the trust company and the administering of the income by the board of commissioners of said county, but the conclusion we have reached on appellee’s proposition No. 5 makes unnecessary the determination of the validity of the trust attempted to be created by any of said instruments of assignment, and hence we will limit our discussion to proposition No. 5.

In the discussion of the question involved in this proposition, appellants earnestly insist that the assignment of stocks and bonds made February 21, 1907, by Alexander F. Ramsey accompanied by a delivery of the same to the trustee for the benefit of the poor and by a complete surrender of dominion and control thereover constituted a valid gift *inter vivos* without fraud on any right of appellee. In support of this contention it is asserted in effect that §3025 Burns 1908, Acts 1891 p. 404, made no change in the law of descent as to the rights of a widow in her husband’s personal estate, but only conferred upon her the same rights when her husband died testate that she already had under the act of 1852 when he died intestate, and that the only effect or intent of such statute of 1891 was to give the widow a right to prevent

the payment of legacies out of her inheritance in her husband's personal property; that statutes in derogation of the common law right to hold and dispose of property ought to be strictly construed, and that when so construed said section becomes only a law of descent as to personal property of testates and confers no more right than any other statute of descent; that there is nothing in this or any other section of the statute law of this State which gives to the wife any interest in the personal estate of her husband during his life, or that in any manner restrains his power of disposition thereof during life; that said section gives the wife no interest in her husband's estate until he dies and then only an interest in the property of which he dies possessed, and this she takes as heir under the statute of distribution and descent and not by contract or purchase; that except as to that property in which the wife has some interest during the lifetime of the husband, his right of disposition during his lifetime is absolute as against her even though for the purpose of preventing her from inheriting.

We cannot agree with appellants' contention that the gift of the stocks and bonds in question by the decedent was a valid gift *inter vivos*. Appellants concede that the

7. following elements are necessary in a gift *inter vivos*:

(1) The donor must be competent to contract; (2) there must be freedom of will; (3) the gift must be completed with nothing left undone; (4) the property must be delivered by the donor and accepted by the donee; (5) the gift must go into immediate and absolute effect. The Supreme Court in the case of *Smith v. Dorsey* (1872), 38 Ind. 451, 10 Am. Rep. 118, said: "To constitute a valid gift *inter vivos* it is essential that the article given should be delivered absolutely and unconditionally. The gift must take effect at once and completely. * * * Gifts *inter vivos* have no reference to the future, but go into immediate and absolute effect. A court of equity will not interfere and give effect to a gift that is inchoate and incomplete. * * *

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‘An absolute gift, which divests the donor’s title, requires the renunciation on his part, and the acquisition on the part of the donee, of all the title to, interest in, the subject of the gift.’ The precise distinction between a gift *inter vivos* and *causa mortis*, as is correctly said in *Bedwell v. Carll* [(1865), 33 N. Y. 581], is that, ‘in the one case, the title passes immediately to the donee on delivery, and the donor has no more right over the property than any other person; in the other, the title does not pass immediately; it is a conditional gift, to take effect only on the death of the donor, who in the meantime has the power of revocation and may at any time resume possession and annul the gift.’” In the case of *Smith v. Ferguson* (1883), 90 Ind. 229, 234, 46 Am. Rep. 216, the Supreme Court said: “An agency is revoked by the principal’s death: therefore, the agent of one who intends a gift *inter vivos* must have performed what was incumbent upon him to make the transfer complete during the donor’s lifetime; otherwise the gift fails, as though the donor himself had failed to make a reasonable delivery. Nor can a gift *inter vivos* be sustained which contemplates a postponement of delivery by the agent or trustee until the donor’s decease; for a gift of personalty made after this fashion must stand, if at all, as a gift *causa mortis*, or else on the footing of a testamentary disposition, with all the formalities of a will.” We think it very questionable whether the finding in this case, to the effect that the instruments of assignment and the stocks and bonds were delivered to Hulet as secretary of the trust company “with directions from said Ramsey to take care of them,” and an acceptance of the possession of such instruments, stocks and bonds by Hulet under such directions alone, and without any knowledge on the part of either of the trustees, except such knowledge as Hulet might be said to have as secretary of one of the trustees, and with no other acceptance by either of the trustees in the lifetime of the donor, is sufficient to show that absolute and unconditional delivery and acceptance, necessary to con-

stitute a gift *inter vivos* as contemplated by the decisions, *supra*.

The other facts found, viz., that Ramsey at the time of the gift was suffering from an incurable disease and well knew that he could live but a short time, and that he

8. made such gift in expectation of death as a result of said disease, and conditioned on that event, etc., are wholly inconsistent with a gift *inter vivos*. In this

9. connection it should be remarked, however, that appellant insists that there is no evidence to support that part of said finding which states that “each and all of the assignments made by Ramsey were conditioned on the event of his death”. We set out the finding of facts in detail on this subject to avoid the necessity of setting out the evidence, and we think it will sufficiently appear from the other facts found by the court, affecting this question, all of which are either admitted or have some evidence for their support, that the ultimate fact that the assignment was conditioned on the event of the death of the donor, was a reasonable, if not a necessary inference to be drawn from the evidence which warranted such other findings. It is not necessary that such condition shall be expressed in words of the donor. It is sufficient if such conditions be either express or implied. Upon this subject Mitchell, C. J., in the case of *Caylor v. Caylor's Estate* (1899), 22 Ind. App. 666, 673, 52 N. E. 465, 72 Am. St. 331, said: “A gift *causa mortis* is consummated when a person in peril of death, and under the apprehension of approaching dissolution from an existing disorder, delivers, or causes to be delivered, to another, or affords the other the means of obtaining possession of any personal goods for his own use, upon the express or implied condition (our italics) that in case the donor shall be delivered from the peril of death the gift shall be defeated.”

The omission of the names of the trustees or assignees in the blank assignment on the back of the stock certificates,

the failure to have the stocks transferred on the books
10. of the bank; the reference to the will as furnishing the purpose and terms of the trust and its management and control, in the assignment of February 21, 1907; the final instructions to Hulet when the papers were all delivered to him to the effect that he should "take care of them"; the expression of the decedent that he would make them right if they were not found to be right; the conduct of the parties with reference to the transaction afterwards; Hulet's impression that Ramsey had retained the income on the stocks and bonds for life when no such provision was in the instruments of assignment; Hulet's failure to say at any time anything about the trust to any member of the board of commissioners or any officer or director of the trust company; Hulet's trip to Arkansas to get a second assignment; these facts and others all tend strongly to show that Ramsey did not intend a fully executed gift *inter vivos* by the transfers and assignment of February 21, and that Hulet did not understand the transaction as perfected and completed so as to put the control of the property assigned, out of the hands of the assignor, during his life. "The

party taking a benefit under a voluntary settlement
11. or gift, containing no power of revocation, has thrown upon him the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable." *Ewing v. Wilson* (1892), 132 Ind. 223, 234, 31 N. E. 64, 19 L. R. A. 767. See also, *Sanborn v. Lang* (1874), 41 Md. 107; *Dyer v. Smith* (1895), 62 Mo. App. 606, 608; *Walker v. Walker* (1890), 66 N. H. 390, 31 Atl. 14, 27 L. R. A. 799, 49 Am. St. 616; *Smith v. Smith* (1898), 24 Colo. 527, 52 Pac. 790, 65 Am. St. 521; *Smith v. Smith* (1896), 22 Colo. 480, 46 Pac. 128, 34 L. R. A. 49, 55 Am. St. 142; *Nichols v. Nichols* (1889), 61 Vt. 426, 18 Atl. 153; *Smith v. Lamb* (1908), 87 Ark. 344, 112 S. W. 884; *Rice v. Waddill* (1901), 168 Mo. 99, 67 S. W. 605.

We must conclude from the finding and the evidence

in this case that there was no intention on the part
10. of the donor to make an irrevocable gift of the stocks
and bonds in question.

But appellants insist that even though the gift in question
be held to be a gift *causa mortis*, still Alexander F. Ramsey
did not die possessed of the stocks and bonds and
12. that the gift must be valid against his heirs, and
therefore good as against his widow; that it is only
testamentary dispositions of personal property that are
assailable by the widow of the decedent. There is author-
ity for the statement that a gift *causa mortis* vests title in
the donee conditionally at the time of delivery and that
where the donor dies without revoking such gift, the vesting
of the property relates back to the time of the delivery
thereof; but on the other hand, there is abundance of author-
ity to the effect that a donor who makes a gift *causa mortis*
remains seized or possessed of the property until death,
within the meaning of a statute giving dower in personal
property of which he dies seized. *Hatcher v. Buford*
(1895), 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507, and
authorities there cited; *Brunson v. Henry* (1894), 140 Ind.
455, 464, 39 N. E. 256; *Devol v. Dye* (1889), 123 Ind. 321,
325, 24 N. E. 246, 7 L. R. A. 439; *Smith v. Ferguson*
(1883), 90 Ind. 229, 233, 234, 46 Am. Rep. 216; *Stroup v.*
Stroup (1894), 140 Ind. 179, 183, 187, 39 N. E. 864, 27
L. R. A. 523; 14 Am. and Eng. Ency. Law (2d ed.) 1052.
In the case of *Davis v. Davis* (1838), 5 Mo. 183, at page
189, the court said: "But it is argued that they (the
property involved) were not his at the time of his death
by reason of the deed. I admit that, so far as the mere
form of right is concerned, they were not his. Here the
form hides the substance, and was intended to do it. But
in a court of chancery, no matter how cunningly and deeply
covered and concealed the right may be, the deep searching
justice of the chancellor, with his argus eyes, will uncover
it. The chancery commands the right to remain where it

should have been till all the purposes of justice are accomplished. So, in this case, the chancellor will redeliver the property to the husband, until the wife is endowed, and when that is done, the residue will be turned loose, subject to the action of the law.” Aside from the instruments of assignment themselves, the other evidence and the finding in this case show the gift to be testamentary in character. Indeed it would be hard to find a case where the facts outside of the instruments of assignment more strongly tend to show such a gift. That it was originally the intention of the donor to make such gift in this manner is evidenced by his first will made in 1894. That this continued to be his intention is evidenced by his second will of 1906 and his last will of 1907. The gift would have remained testamentary in fact, as well as in intent, had not the donor been advised that in case his wife survived him, she, by an election to take under the law, might diminish the gift to the extent of her one-third interest therein as his widow. It was for the express purpose of preventing this result, that the gift was changed from one testamentary in fact to one colorably absolute. The first assignment still permitted the testamentary instrument to fix and define the purpose of the trust and regulate and direct its management, and the application of the income to be derived therefrom. The gift was not entirely freed from this testamentary taint appearing in fact upon the instruments creating it until the assignment of March 9, 1907, was taken from decedent’s home city in Indiana to Arkansas and there presented to him ready for his signature at a time when he and all concerned knew that he was *in extremis*. And, this instrument was so prepared that the donor was allowed to retain the income from the property given during the remainder of his life. This, in some jurisdictions, is held to give the deed of assignment a testamentary effect. *Tucker v. Tucker* (1860), 29 Mo. 350, 352, 353. But whether said gift be held to be a gift *causa mortis*

or testamentary in effect, it is clear under the authorities that when made under the circumstances and conditions disclosed by the finding in this case that it will not operate to defeat the widow's interest in the property so given. There can be no question but that the general rule is, that the husband has the absolute control of his personal property during his life to give and dispose of as he wills and may alienate the same without his wife's consent free from any claim of hers, but we think it equally well settled that there are some well defined exceptions to this rule. We think the peculiar facts of this case, indicated in this opinion, bring it clearly within the most exacting exceptions to the general rule as expressed in the courts of practically all jurisdictions including some of those, the decisions of which are relied on by appellant. In the case of *Walker v. Walker*, *supra*, 392, the court said: "Upon the facts found at the hearing the bill can be maintained. The attempt of the plaintiff's husband to dispose of nearly all of his personal estate so that he should have the enjoyment and control of it for life and the plaintiff be deprived of any portion of it at his decease, cannot be sanctioned. It is settled law, that conveyances of real estate made by the husband during the coverture for the purpose of defeating the wife's rights, are, as to her, fraudulent and void. Whether the same rule obtains in transfers of personal property for the like purpose when the husband reserves therein no right to himself, is a question upon which the authorities are somewhat at variance; but where the transfer is a mere device or contrivance by which the husband, not parting with the absolute dominion over the property during his life, seeks at his death to deprive his widow of her distributive share, there is no substantial conflict of authority that the rule applicable to conveyances of realty prevails." In the case of *Stone v. Stone* (1853), 18 Mo. 389, 392, the court said: "Although dower is given in personal estate by our statute, yet it was not thereby intended to restrain the husband's

absolute control of it during his life, to give and dispose of as he wills; *provided it be not done in expectation of death*, and with a view to defeat the widow's dower. The husband may do as he pleases with his personal property, subject to this restriction. After the enjoyment of the property, in the most absolute manner, during almost his entire life, the law will not permit him, at the approach of death, and with a view to defeat his wife's right of dower, to give it away. *If such a disposition was allowed, the efficacy of the statute conferring dower in personalty would depend on the whim or caprice of the husband.*" To the same effect are the following cases: *Stone v. Stone, supra*; *Davis v. Davis, supra*; *Murray v. Murray* (1890), 90 Ky. 1, 8 L. R. A. 95, 13 S. W. 244; *Manikee v. Beard* (1887), 85 Ky. 20, 2 S. W. 545; *Thayer v. Thayer* (1842), 14 Vt. 107; 39 Am. Dec. 211, and notes; *McGee v. McGee* (1843), 26 N. C. 105; *Tucker v. Tucker* (1860), 29 Mo. 350; *Baker v. Smith* (1890), 66 N. H. 422, 23 Atl. 82; *Smith v. Hines* (1863), 10 Fla. 258; *Dyer v. Smith, supra*; *Walker v. Walker, supra*; *Smith v. Smith* (1898), 24 Colo. 527; *Smith v. Smith* (1896), 22 Colo. 480; *Nichols v. Nichols, supra*; *Smith v. Lamb, supra*; *Rice v. Waddill, supra*.

It is insisted that the finding of facts does not support the conclusions of law because it fails to find that decedent was the owner of the stocks and bonds at the time of his death. While it is true that it is not found in so many words that the decedent died the owner of said stocks and bonds, this is the effect of the finding especially as between the parties here involved. The issue upon this branch of the case was the validity of the instruments of assignment, and whether appellee on account of such assignments should be prevented from taking her third in the property assigned as widow of the assignor. Both appellants and appellee claim through the decedent and a finding of facts that showed the assignment to appellant to be invalid was all that was necessary to warrant the conclusions

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of law stated. Where the facts found in the special
 14. finding lead to but one conclusion or result, the deduction is a conclusion of law and not an ultimate fact. *DePauw Plate Glass Co. v. City of Alexandria* (1898), 152 Ind. 443, 453, 52 N. E. 608; *Indiana Trust Co. v. Byram* (1905), 36 Ind. App. 6, 72 N. E. 671, 73 N. E. 1094; *Mayer v. Lesh Paper Co.* (1909), 45 Ind. App. 250, 255, 89 N. E. 894, 90 N. E. 651. It is next insisted that the con-

15. clusions of law were not authorized because the trial court failed to find fraud as a fact. In view of the other facts found, such a finding was unnecessary. *Stroup v. Stroup, supra*; *Ewing v. Wilson, supra*; *Cotterell v. Koon* (1898), 151 Ind. 182, 185, 51 N. E. 235; 14 Cent. L. J. 104.

Error in overruling a motion to retax costs is assigned and relied on for reversal. There seems to have been no judgment for appellants on any issue involved in the case

16. and no motion for any such judgment. On the face of the record and motion, no available error is presented by the ruling on said motion. *VanGundy v. Carrigan* (1891), 4 Ind. App. 333, 338, 30 N. E. 933; *Baldwin v. Sutton* (1897), 148 Ind. 591, 594, 47 N. E. 629, 1067; *Hooker v. Phillippee* (1900), 26 Ind. App. 501, 503, 60 N. E. 167; *Hawkins v. Stanford* (1894), 138 Ind. 267, 37 N. E. 794; *Reynolds v. Shults* (1885), 106 Ind. 291, 6 N. E. 619.

This disposes of all questions except those presented by the ruling on the motion for new trial. The admission of the evidence of appellee to the effect that she did not
 17. see the instrument of March 9, 1907, is complained of.

Whether this evidence was admissible for all purposes we need not decide, because it appears that the court stated when admitted that it was admitted as bearing only on the mental condition of the decedent. The evidence was at least admissible as bearing on this question. *Roberts v. Huddleston* (1883), 93 Ind. 173; *Stumph v. Miller* (1895), 142 Ind. 442, 445, 41 N. E. 812; *Holliday v. Thomas* (1883), 90 Ind. 398, 402; *Sunnyside Coal, etc., Co. v. Reitz* (1895),

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14 Ind. App. 478, 498, 39 N. E. 541, 43 N. E. 46; *Ginn v. State* (1903), 161 Ind. 292, 295, 68 N. E. 294, and cases cited.

We deem it unnecessary to discuss the sufficiency of the evidence in this case further than to say that the facts herein stated, and the findings set out all have some evidence to support them. We find no error in the record. Judgment affirmed.

ON PETITION FOR REHEARING.

HOTTEL, P. J.—Appellants have filed a petition for a rehearing in this case, and, in their brief in support thereof, very earnestly and ably press upon the court their reasons therefor. Our attention is first called to our manner of disposing of the first and second of the five propositions insisted on by appellee and set out in the opinion. The opinion expressly stated that the conclusion reached by the court on the fifth proposition rendered unnecessary a discussion of the other propositions, but in that connection we made some observations with reference to the effect of the decision of the Supreme Court in the case of *Crawfordsville Trust Co. v. Ramsey* (1912), 178 Ind. 258, 98 N. E. 177, upon the first and second propositions and appellant's contention in relation thereto, which upon investigation we have concluded are in apparent conflict with some of the decisions to which our attention is called by appellants in their brief on this petition. We have therefore eliminated from the original opinion such observations, they being entirely independent of and unnecessary to the support of the final conclusion reached on the fifth proposition which presented the controlling question upon which the opinion rests.

It is also insisted by appellant that "in the opinion", this court erroneously assumed that the trial court found that the *gift* was conditioned on Ramsey's death, and incorrectly quoted appellant as contending that there was no evidence

to support "that part of said finding which states that the *gift* was conditioned on that event." We inadvertently used the word "*gift*" where strict accuracy required the use of the word "assignments." Appellant's contention made in his original brief was that there was "no evidence in the record to sustain that part of finding 25 * * * which is that each and all of the *assignments* made by Ramsey, were conditioned on the event of his death * * *". Appellants, in their original brief, contended that the assignments were set out in the finding and that they show that they were not conditioned on any event. The assignments in this case were the instruments through which the gift claimed by appellant was conveyed, and while such assignments did not in fact constitute the gift, if by the word gift, the property given is meant, yet they did constitute the evidence of the gift here relied on, and when the finding referred to is read in its entirety, it is manifest that by the word *assignments*, as there used, the court intended to convey the same meaning that would have been conveyed by the use of the word gift. In this connection, counsel, in their original brief, said: "Just what the court meant by the words 'conditioned on that event' we are unable to say. If the court meant that the assignments were executed by Mr. Ramsey because he thought he was going to die that might very well bring the gift within the definition of a gift *inter vivos* and at least would not take it out of the terms of a gift *causa mortis*." We do not think there can be any doubt about the meaning of this finding or the meaning of the words therein "conditioned on that event". Such finding not only means what appellants think it might mean, viz., that the assignments were executed by Mr. Ramsey because he thought he was going to die, but it means more, as clearly appears from the words which immediately follow the words "conditioned on that event", viz., "*and would not have been made had not the said Ramsey been suffering from said disease and soon expected to die therefrom.*"

This language certainly puts the meaning of this finding beyond doubt or controversy and it has ample evidence for its support as shown by other findings of an evidentiary character set out in the original opinion, all of which findings had some evidence to support them.

We next consider appellant's contention that the opinion is in conflict with the decision of the Supreme Court in the case of *Pond v. Sweetser* (1882), 85 Ind. 144, and 12. that if it stands, it will upset modern business. The answer to the first of these contentions is that the case referred to was decided before the passage of §3025 Burns 1908, Acts 1891 p. 404. While it is true, as appellant contends, that this section of the statute affects only the personal property of which the husband dies seized, and is not intended as a limitation on his right of disposition of such property during his life, yet it is a clear and an express manifestation of the intention of the legislature, expressed since such decision was rendered, to prevent and prohibit the husband from depriving his wife of a one-third interest in his personal property by a testamentary disposition thereof. The findings in this case show that the decedent, Ramsey, did by indirection, that which the section of statute referred to was intended to prevent him from directly doing. With said §3025, *supra*, now a part of the law of the State, we think the facts of this case bring it clearly within the rule laid down in the numerous cases decided in other jurisdictions and cited in the original opinion, involving analogous statutory provisions, and also within the spirit of the more recent holdings of the Supreme Court, all of which recognize and indicate a disposition on the part of courts generally to construe liberally statutes of the character here involved. *Darby v. Vinnedge* (1913), 53 Ind. App. 525, 100 N. E. 862, and cases there cited; *Staser v. Garr, Scott & Co.* (1906), 168 Ind. 131, 135, 136, 79 N. E. 404, and cases there cited. The conclusion reached in the original opinion is also supported by the numerous decisions of the Supreme

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Court and this court which expressly hold that the courts will not permit one to do indirectly that which the law expressly forbids him from doing directly. *Sharp v. State, ex rel* (1913), 54 Ind. App. 182, 99 N. E. 1072, and cases cited; *State ex rel, v. Forsythe* (1896), 147 Ind. 466, 472, 473, 44 N. E. 593, 33 L. R. A. 221, and cases cited. To us it seems a reflection on "modern business" to assume that it will be disturbed to any appreciable extent by this opinion.

The opinion expressly recognizes the general rule to be that a man, during life, may dispose of his personal property as he pleases, and that his wife or his widow will have no interest in the property so disposed of. It is the exceptional facts and features of the present case that prevent the application of such general rule, and we do not think that "modern business" will have to do very frequently with *gifts made in extremis* by a donor who gives because he knows and fully realizes that he is afflicted with a disease from which he *cannot* recover, the gift being conditioned on the event of his death, and with an express reservation of the use of the property given during his life, and changed from a gift by will in the first instance to one by assignment, because the donor, after making his will, learns that his widow may defeat the gift to the extent of her one-third interest therein, and to prevent such a result makes an assignment of the property so willed. Such, in effect, are the findings upon which the original opinion is based. It shows that there was present in this case every element essential and necessary under any and all of the decisions cited in the original opinion, where the facts were held sufficient to take the particular case out of the application of the general rule that permits the husband in life to sell or transfer his personal property as he pleases, and sufficient to bring it within the provisions of a statute intended to preserve the wife's interest in such property as against any disposition thereof, testamentary in character, and made with the intent to defeat the wife of her interest in the

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property so disposed of. The petition for rehearing is therefore denied.

NOTE.—Reported in 100 N. E. 1049; 102 N. E. 282. As to gifts *causa mortis*, see 99 Am. St. 890. As to election by widow between benefits of will and right to dower, see 92 Am. St. 605. On the power of a husband or his creditors to defeat dower, see 18 L. R. A. 75. See, also, under (2) 40 Cyc. 1376; (4) 3 Cyc. 188; (5) 2 Cyc. 535; (6) 2 Cyc. 533; (7) 20 Cyc. 1195, 1243; (8) 20 Cyc. 1230; (9) 20 Cyc. 1211; (10) 20 Cyc. 1198; (11) 20 Cyc. 1222; (12) 21 Cyc. 1155; (14) 38 Cyc. 1978; (16) 2 Cyc. 535.

A. D. BAKER COMPANY v. SMEDLEY.

[No. 7,737. Filed December 20, 1912. Rehearing denied February 21, 1913. Transfer denied December 9, 1913.]

1. **SALES.—Rescission.—Fraud.—Damages.**—Where a party relies upon the rescission of a contract of sale on the ground of fraud, he need not aver and prove a monetary damage. p. 81.
2. **CONTRACTS.—Validity.—Fraud.—Sales.**—A contract is voidable *ab initio* for fraud, where, but for the fraudulent representations, the party would not have been induced to enter into it; hence the purchaser of a traction engine, who relied on the seller's representation that the title was unincumbered, on discovering that such representation was false, could rescind the entire contract for the fraud practiced upon him and thereby prevent the seller from obtaining any advantage on account of the fraud and deception. p. 81.
3. **CONTRACTS.—Rescission.—Fraud.**—To justify rescission on the ground of fraud, it must appear, among other things, that there was misrepresentation as to a material matter constituting an inducement to the contract, and that the party rescinding was injured thereby. p. 81.
4. **SALES.—Misrepresentation as to Incumbrances.—Rights of Purchaser.**—Where property, in fact incumbered, was represented to the purchaser as free from incumbrance, and such representation was a material inducement to the making of the contract, such purchaser, if injured by the fact that the property as incumbered is worth less to him than if unincumbered, may rescind on discovering the fraud, even though he has not been deprived of possession by reason of such incumbrance. p. 82.
5. **APPEAL.—Review.—Harmless Error.—Demurrer to Answer.**—Error, if any, in overruling a demurrer to defendant's answer alleg-

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ing a rescission of the contract of sale of a traction engine for plaintiff's fraud in representing that the title was unincumbered, grounded on the proposition that such answer did not show by proper averments that defendant was injured by the alleged fraud, was rendered unavailable, where there was evidence received without objection showing injury by reason of such fraud, since the defect in the answer was such as could have been amended to conform to the evidence and must on appeal be deemed to have been so amended by virtue of §700 Burns 1908, §658 R. S. 1881. p. 82.

6. SALES.—*Rescission for Fraud.—Statu Quo.*—Where the purchaser of a traction engine rescinded the contract of sale on the ground of fraud in the seller's representation that it was not incumbered by mortgage, he was not required, in order that the parties be placed in *statu quo*, to offer to return the reasonable value of the use of the engine for the time for which he used it, where the representations as to the fitness of the engine were also untrue, and such value was less than the value of the repairs and the cost of rendering the engine suitable for use. p. 84.

From Washington Circuit Court; *Thomas B. Buskirk*, Judge.

Action by A. D. Baker Company against Morgan L. Smedley. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Oscar K. Hobbs and *P. V. Hoffman*, for appellant.

W. W. Hottel, for appellee.

IBACH, C. J.—This was an action by appellant on notes given as part of the purchase money for a traction engine, and to foreclose a chattel mortgage securing the same. Appellee answered in general denial and filed a second paragraph of answer alleging that appellee had rescinded the sale because of fraud on the part of appellant's agent. Appellant's demurrer to this paragraph of answer was overruled; it replied in two paragraphs, and an agreement was made that all matters in counterclaim, answers and replies thereto might be given in evidence without further pleading. The court made a special finding of facts, stated conclusions of law in favor of appellee, and rendered judgment

against appellant for costs, and that it is the owner of the engine by reason of a rescission of the contract of sale.

It is insisted that the court erred in overruling the demurrer to the second paragraph of answer, because it does not show by proper averments that appellee was

1. injured by the alleged fraud of appellant, in representing the engine as free from incumbrances at the time of sale, when it was in fact incumbered by a chattel mortgage, and is therefore insufficient. This is not a case where the party defrauded retains the property and sues for damage sustained on account of that fraud, but is one where appellee has pursued another remedy, by rescinding the contract of sale, for fraud, which he had a right to do, and in such case it is not necessary to aver and prove

monetary damage. It is well settled that a contract

2. is voidable *ab initio* for fraud where one is induced to enter into a contract which he would not have made but for the fraudulent representations. Neither party to any contract will be permitted to deceive the other as to a material matter constituting an inducement to the contract, either actively or passively, and a court whose province is to administer justice will see that no one shall secure any advantage of his adversary from his own fraud. Hence in this case, appellee, on discovering that he had not received the property contracted for, but had obtained a different and less valuable interest in it than a full and complete title, or in other words, when he discovered the fraud practiced upon him, had the right to rescind the entire contract and thereby prevent appellant from obtaining any advantage over him on account of its fraud and deception.

In order to justify rescission upon the ground of fraud, there must be shown, among other things, that there was misrepresentation as to a material matter constituting

3. an inducement to the contract, and that the party rescinding was injured thereby. It has often been

held that where property, in fact incumbered, was
4. represented as free from incumbrance, and such representation was a material inducement to the making of the contract, the purchaser, upon discovering the incumbrance, may, where he can show injury from the fact that the property as incumbered is less valuable to him than if it were unincumbered, rescind the contract, and it is not necessary that he should have been deprived of possession, in order to show injury. Tiedeman, Sales §164; *Merritt v. Robinson* (1880), 35 Ark. 483; *Stevenson v. Marble* (1897), 84 Fed. 23; *Halsell v. Musgrave* (1893), 5 Tex. Civ. App. 476, 24 S. W. 358; *Grose v. Hennessey* (1866), 95 Mass. 389; *Masson v. Bovet* (1845), 1 Denio (N. Y.) 69, 43 Am. Dec. 651; *Ketletas v. Fleet* (1811), 7 Johns. (N. Y.) *324; 35 Cyc. 73.

We do not decide whether it is sufficiently alleged in the answer that appellee was injured by appellant's false representations. It is enough to say, that it was proved

5. at the trial without objection that, at the time the engine was sold to appellee, one Chastain was the holder of a valid chattel mortgage on it for an amount greater than its value, that Chastain told appellee that he was going to foreclose such mortgage, and thereupon appellee tendered the engine back to appellant, and did not use it again. Thus there was evidence showing injury to appellee by reason of appellant's fraud. Section 700 Burns 1908, §658 R. S. 1881, provides that this court shall not reverse a judgment for any defect in form, in any pleading, which might be deemed amended in the court below, but such defect shall be deemed to be amended in the higher court. If the answer was defective in the particular claimed, the court could have permitted it to be amended to conform to the evidence, and consequently this court must deem it amended. *Crawfordsville Trust Co. v. Ramsey* (1912), 178 Ind. 258, 98 N. E. 177; *Noble v. Davison* (1912), 177 Ind. 19, 96 N. E. 325; *Vulcan Iron, etc., Co. v. Electro, etc.,*

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Min. Co. (1913), 54 Ind. App. 28, 99 N. E. 429, 100 N. E. 307. And by §350 Burns 1908, §345 R. S. 1881, it is provided that no objection taken by demurrer and overruled, shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined. In this case, this statute might be invoked, if needed, but the cases above cited determine that error, if any, in overruling the demurrer to the answer, is unavailing to appellant in this case.

It appears from the finding of facts that the defendant executed the notes and gave the mortgage sued on as part of the purchase price for the engine described in the mortgage; that appellant's authorized agent at the time of the sale represented to appellee that the engine was in good shape and condition and free from liens and incumbrances; that appellee relied upon these representations and believed them to be true, and by them was induced to buy the engine and execute the notes and mortgages and turn over another engine as part of the purchase price, that at the time of the sale, the engine was mortgaged to one Chastain for a larger sum than the defendant had promised to pay for it, and this mortgage was duly recorded and a lien on the engine, which fact plaintiff knew when the sale was made, and defendant did not know at the time; that the first notice defendant received of the existence of the mortgage was from Chastain, who informed him that he was going to foreclose his mortgage, and defendant offered to surrender the engine to him without foreclosure proceedings; that immediately after defendant received such information, he at once demanded the notes sued on and a cancelation of the debt and offered to surrender the engine to the plaintiff; that the agent of defendant at the time of sale warranted the engine in first class condition for work, but the water-tanks were old and unfit, and the whistle was gone and defendant had to spend \$50 to repair said defects before he could use it; that it was an old wornout engine that had been

used by two or three parties; that the defendant was damaged on account of the condition of the engine and the repairs necessarily made thereon by being required to expend more than the value of the use of the engine prior to the offer to surrender it; that defendant did not use the engine after his offer to surrender; that the value of the use of the engine from the time he offered to surrender the engine until the mortgage was released was more than the value of the engine, or the amount of the notes.

From these findings there appear all the essential facts to support the rescission of a contract on the ground of fraud.

It was unnecessary, in order that the parties should

6. be placed in *statu quo* for defendant to offer to return the reasonable value of the use of the engine for the time for which he used it, since such value was less than the cost of rendering it suitable for use and the value of the repairs added to the engine. The court was correct in its conclusions of law that the law was with the defendant on his special answer, that the contract should be rescinded and the notes canceled and surrendered, and plaintiff should have the engine and take nothing by reason of its complaint, and bear the costs of the action.

There is some evidence supporting every finding of fact, and it appears that the cause was fairly and justly tried, and a correct result reached. Judgment affirmed. Hottel, J., not participating.

NOTE.—Reported in 100 N. E. 307. See, also, under (2) 9 Cyc. 431, 433; (3) 9 Cyc. 425, 431; (4) 35 Cyc. 73; (5) 31 Cyc. 358; (6) 9 Cyc. 437; 35 Cyc. 146.

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LOUISVILLE AND NORTHERN RAILWAY AND LIGHTING COMPANY v. HOLSCLAW.

[No. 7,762. Filed May 6, 1913. Rehearing denied October 17, 1913.
Transfer denied December 9, 1913.]

1. **APPEAL.—Questions Reviewable.—Admission of Evidence.**—No available error is presented as to the ruling on a motion to strike out the answer to a question to which no objection was made, and which assigned only that the answer was immaterial. p. 86.
2. **CARRIERS.—Injuries to Passengers.—Negligence.—Instructions.**—In a passenger's action against an electric railroad company for personal injuries, where the first paragraph of complaint charged negligence as to the condition of the track, and the second charged negligence in the operation of the car, an instruction that if plaintiff was injured without her fault while a passenger on said car "which was derailed by reason of the manner in which it was operated and propelled," though the "derailment might not have occurred in the manner described in the first paragraph of complaint, nevertheless, a presumption of negligence arises against the defendant," to rebut which the defendant must show by a fair preponderance of the evidence that the "derailment could not have been avoided by the exercise of the highest degree of practical care and diligence," was not limited to the first paragraph, and was a correct statement of the law. p. 87.
3. **CARRIERS.—Injuries to Passenger.—Instructions.—Measure of Damages.**—An instruction informing the jury that if it found for plaintiff, who was injured while a passenger on defendant's car, she could only recover for such damages as the evidence relating to damages showed she was entitled to recover for the injuries described in her complaint, not exceeding the amount therein demanded, which sum should fully and fairly compensate her for the injuries, if any, she had so received, was not open to the objection that it authorized the jury in assessing the damages to consider injuries due to a former accident for which defendant had settled adversely. p. 88.
4. **APPEAL.—Review.—Harmless Error.—Instructions.**—An instruction not open to the objection urged by appellant is not ground for reversal, although it is subject to an erroneous inference affecting the appellee. p. 89.
5. **APPEAL.—Review.—Harmless Error.—Instructions.**—An instruction susceptible to a harmful inference is rendered harmless by other instructions which removed the possibility of such inference. p. 89.

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6. APPEAL.—*Review.—Harmless Error.—Instructions.*—Although an instruction in a personal injury case was so drawn as to possibly leave the impression that if plaintiff had been injured in an accident prior to the one complained of, and settlement therefor had not been made, she could recover for such former injuries, its giving was harmless, in view of specific instructions stating that plaintiff could not recover for any former injuries and must recover, if at all, for the injuries alleged in her complaint. p. 89.

From Scott Circuit Court; *Joseph H. Shea*, Judge.

Action by Sarah Holsclaw against the Louisville and Northern Railway and Lighting Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Frank S. Jones, Noble J. Hays, Charles D. Kelso, Geo. H. Voigt and Carl E. Wood, for appellant.

Stotsenburg & Weathers, Mark Storen and Paris & Trusty, for appellee.

FELT, P. J.—This is an action by the appellee against the appellant to recover damages for personal injuries alleged to have been caused by appellant's negligence. Trial by jury resulted in a verdict for appellee. From a judgment rendered upon the verdict, this appeal was taken. Appellant has assigned as error the overruling of its motion for a new trial. The new trial was asked on the ground that the court erred in the admission and exclusion of certain evidence and in the giving of certain instructions.

Appellant's counsel concede that the questions relating to the evidence are not properly saved except as to the seventeenth cause for a new trial. This was a motion to

1. strike out the answer to a question to which no objection was made. The only reason assigned in the motion was that the answer was immaterial. This does not present available error. *Cleveland, etc., R. Co. v. Wynant* (1893), 134 Ind. 681, 694, 34 N. E. 569; *Pence v. Waugh* (1893), 135 Ind. 143, 34 N. E. 860.

The main questions relied upon by appellant for reversal

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relate to the instructions. Some question has been raised as to whether the instructions are properly in the record but giving appellant the benefit of a consideration of the instructions, the judgment of the lower court must be affirmed. It is contended by appellant that instruc-

2. tion No. 11 given at the request of appellee is erroneous in that it shifts the burden of proof from the plaintiff to the defendant. The first paragraph of the complaint contains a specific charge of negligence consisting of defects in appellant's track, which are particularly described; that appellee was a passenger on a car to which was attached a trailer, which by reason of the alleged defects in the track "and by reason of the carelessness and negligence as aforesaid", was derailed and thrown violently against the car on which appellee was a passenger, causing her alleged injuries. The second paragraph of complaint contains a general charge of negligence in the operation of the car on which appellee was a passenger in this, that it was so negligently and carelessly propelled and operated by the motorman in charge of the same as to derail and throw the rear car from the track and to cause it to become uncoupled, swing around with great momentum, and suddenly and with great force to come in contact with the rear end of the car on which appellee was a passenger and thereby cause the injuries of which she complains. The gist of instruction No. 11 is that, if appellee was injured, without her fault, while a passenger on said car which was "derailed by reason of the manner in which it was operated and propelled", though the "derailment might not have occurred in the manner described in the first paragraph of the complaint, nevertheless, a presumption of negligence arises against the defendant", and to rebut such presumption the appellant must show by a fair preponderance of the evidence that the "derailment could not have been avoided by the exercise of the highest degree of practical care and diligence." Appellant contends that this instruc-

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tion is limited in its application to the first paragraph of complaint and that no such presumption of negligence would arise under the specific averments of that paragraph. The fact that the instruction speaks of the car as derailed by reason of the manner in which it was operated, shows that reference is made to the second as well as to the first paragraph of complaint. Conceding, without deciding, that under the first paragraph no presumption of negligence arises by the occurrence of an accident as alleged, we do not think the instruction contains the vice complained of, for the reason that the case was tried on both paragraphs of the complaint, and the court in this and other instructions clearly covers the law applicable to both paragraphs. This instruction states that if the preponderance of evidence shows that the car was "derailed by reason of the manner in which it was operated" and plaintiff was thereby injured without her fault, the presumption of negligence arose against the company, though such derailment did not occur in the manner alleged in the first paragraph of complaint. This is a correct statement of the law many times declared by this and our Supreme Court, and was clearly applicable under the charge of negligent operation made in the second paragraph.

Instruction No. 20 relates to the measure of damages. Appellant claims it authorized the jury to go outside the issues and evidence in assessing damages. After a
3. careful study of it, we are convinced that it is not open to the objections urged by appellant and that it is a fair and accurate statement of the law. It clearly informed the jury that if it found for the plaintiff, she could only recover for such damages as the evidence relating to damages showed she was entitled to recover for the injuries described in the complaint, not exceeding the amount therein demanded, which sum should fully and fairly compensate her for the injuries, if any, she had so received. Appellant was claiming that appellee's injuries

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were due to a former accident for which it had settled, and appellee, while not disputing such settlement, was claiming the injuries alleged in her complaint and for which she sought a recovery, were caused solely as alleged in her complaint in this suit.

Appellant also complains of instruction No. 16, given at the request of appellee on the ground that the jury was warranted in inferring from it that appellee might

4. recover for injuries received in a former accident.

We do not believe the instruction is open to such inference, but are inclined to the view that if any erroneous inference may be drawn therefrom, it is one that placed on appellee the unnecessary burden of showing that if she had been injured in a former accident, she must show that she had recovered therefrom before she was entitled to recover damages for any injury received in the accident complained of in this case.

We see no objection to instruction No. 14 given at appellee's request. If it is possible to draw from it any harmful inference as claimed by appellant, such possibility

5. was removed by the other instructions given. It is also contended that instruction No. 4 given on the court's own motion, informed the jury that if the

6. plaintiff had been injured in another accident and had made settlement for such injuries, she could not in this action recover for those injuries, thereby leaving the impression upon the jury that if she had been so injured and settlement therefor had not been made, she could in this action recover damages for former injuries. Instruction No. 4 standing alone, is not an accurate statement of the law and to some extent may be open to the objection urged. Nevertheless, we are confident the jury was not led into any erroneous view of the law by hearing it, because of the specific instructions given with reference to any former accidents or injuries, in which appellee had been involved. By instruction No. 5, given on the court's own

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motion, the jury was specifically told that the plaintiff could not recover in this action for any injuries received in former accidents and must recover, if at all, for the injuries alleged in her complaint. Instruction No. 2 given at appellant's request, refers specifically to the alleged former accidents and to the character of the injuries mentioned in connection therewith and states if "you further find that the plaintiff is still suffering from these injuries then I charge you that you must not allow the plaintiff any damages in this action for injuries, if any, you find to exist, on account of said former accidents." These two instructions clearly and definitely limit the appellee to a recovery for injuries, if any, resulting alone from the accident alleged in her complaint in this suit and left no room for any possible inferences to the contrary.

A careful study of all the instructions given, leads to the conclusion that the court in the giving of instructions committed no error, harmful to appellant. Upon the whole, the law was fully and accurately stated as favorably to appellant as the facts and issues of the case warrant. The other questions mentioned in the briefs are not of a character to indicate any possible harm to appellant and therefore do not require further discussion. The law on most of the questions suggested, has already been settled in former decisions in harmony with our conclusion, that no error harmful to appellant is shown by the record or briefs. *Louisville, etc., Traction Co. v. Worrell* (1909), 44 Ind. App. 480, 489, 86 N. E. 78; *Cincinnati, etc., R. Co. v. Bravard* (1906), 38 Ind. App. 422, 76 N. E. 899; *Indianapolis St. R. Co. v. Schmidt* (1904), 163 Ind. 360, 71 N. E. 201; *Hamilton v. Love* (1899), 152 Ind. 641, 646, 53 N. E. 181, 54 N. E. 437, 71 Am. St. 384; *Evansville, etc., R. Co. v. Mills* (1905), 37 Ind. App. 598, 604, 77 N. E. 608; *Newcastle Bridge Co. v. Doty* (1906), 168 Ind. 259, 266, 79 N. E. 485; *Indiana R. Co. v. Maurer* (1902), 160 Ind. 25, 31,

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25 N. E. 156. The judgment of the lower court is therefore affirmed.

Ibach, C. J., Adams, Lairy and Hottel, JJ., concur.

Shea, J., not participating.

NOTE.—Reported in 101 N. E. 750. As to duties and liabilities of street railway to passenger, see 118 Am. St. 461. As to presumption of negligence from happening of accident, see 113 Am. St. 986. For a discussion of the derailment of a train or car as evidence of negligence on the part of a carrier of passengers, see 12 Ann. Cas. 1045 Ann. Cas. 1913 E 552. See, also, under (1) 38 Cyc. 1375, 1406; (2) 6 Cyc. 628; (3) 13 Cyc. 237, 243; (4) 38 Cyc. 1809; (5) 38 Cyc. 1786.

VANDALIA COAL COMPANY ET AL. v. UNDERWOOD.

[No. 7,999. Filed May 28, 1913. Rehearing denied November 6, 1913. Transfer denied December 9, 1913.]

1. **APPEAL.—Assignment of Errors.—Waiver.**—Alleged errors in overruling and sustaining demurrers are waived by appellant's failure to discuss same. p. 93.
2. **APPEAL.—Exceptions to Conclusions of Law.—Admissions.**—Exceptions to the trial court's conclusions of law, for the purposes of the appeal, concede that the facts are fully and correctly found. p. 96.
3. **MINES AND MINERALS.—Coal Lease.—Construction.**—A provision in a lease of coal lands that the lessee is to mine sufficient coal "to make the royalty thereon amount to \$600 annually, or in default thereof pay said sum each year, * * * and any sum paid in excess of royalty of coal mined shall be treated as advanced royalty, and shall be deducted out of any excess over \$600 in any year or years thereafter," is not ambiguous as to when the operator is entitled to credit for royalties previously paid, but by its terms gives the right to such credit only where the minimum of \$600 has been paid without mining coal sufficient during the year to amount to that sum, and in a succeeding year the royalty on coal actually mined exceeds \$600, in which event a credit may be had on such excess of the difference between the amount of royalty for coal actually mined in such previous year and the \$600 actually paid. pp. 97, 98.
4. **CONTRACTS.—Construction.**—Where the language employed expresses a definite meaning involving no absurdity or contradiction between different parts of an instrument, the court will not resort

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to extrinsic facts to arrive at the intention of the parties, but will give effect to the meaning apparent from the language employed. p. 97.

5. **MINES AND MINING.—Coal Lease.—Action for Royalties.—Findings.—Conclusions of Law.**—In a lessor's action on a coal lease providing that the lessee should mine sufficient coal each year to make the royalty amount to \$600 annually, and in default thereof to pay said sum each year, and that any sum paid in excess of royalty of coal mined should be treated as advanced royalty and be deducted from any excess over \$600 in any year thereafter, where the court found that for a certain year the royalty on coal mined amounted to only \$245.86, which was the sum paid, and that for the previous year the royalty amounted to \$838, which sum was paid, a conclusion of law stated thereon that there was due plaintiff the sum of \$354.14 as unpaid annuity for the last year was not erroneous, but strictly in accordance with the terms of the lease. p. 98.
6. **CONTRACTS.—Construction.**—While extraneous matter may be considered where a contract is ambiguous, for the purpose of ascertaining and effectuating the original intention of the parties, the court cannot make a new contract for them, but must, in the absence of fraud, give effect to the contract actually entered into. p. 98.
7. **MINES AND MINING.—Coal Lease.—Action for Royalties.—Findings.**—In an action to recover royalty due under a coal lease providing for a minimum sum to which the lessor was entitled each year, where it was found that coal was mined during a certain year which produced royalty in a sum less than such minimum, and that the coal was not exhausted when operations ceased, the further finding that the mine could not be operated at a profit, would not prevent a recovery of such minimum rental. p. 99.
8. **APPEAL.—Review.—Findings.—Conclusions of Law.**—In an action for rentals due under a coal lease providing for a minimum annual rental, conclusions of law that the operator of the mine, as assignee of the lease, was primarily liable for the amount due, that as between the parties the original lessee became surety for the payment of such amount, and that the property of the operator should first be exhausted in satisfaction of the judgment before levying on the property of the original lessee, were not erroneous. p. 99.

From Putnam Circuit Court; *John M. Rawley*, Judge.

Action by Amos Underwood against the Vandalla Coal Company and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Barrett & Barrett, Thomas W. Hutchison, Davis & Bogart and Henry W. Moore, for appellants.

Albert Payne, for appellee.

FELT, P. J.—This is a suit upon a lease of coal lands executed by the appellee to appellant, Ray, which lease passed by successive assignments to the Central Coal Company, the Asherville Mining Company and then to appellant, the Vandalia Coal Company. The complaint was in one paragraph to which a demurrer was overruled. Nine paragraphs of answer were filed, the first of which was a general denial. A demurrer for want of facts was sustained to the third, fourth, seventh, eighth and ninth paragraphs and overruled as to the second, fifth and sixth. A reply in general denial was filed to the paragraphs of answer to which the demurrer was overruled. The court, at the request of the parties, made a special finding of facts and stated its conclusions of law thereon, which were in favor of appellee. Appellants have each assigned as error the overruling of the demurrer to the complaint for insufficiency of facts alleged, and the sustaining of the demurrer to each of the paragraphs of answer as above indicated; also error in each conclusion of law stated upon the finding of facts and in overruling the separate motions of appellants for a new trial. The questions relating to the

1. several demurrers are not discussed and are therefore waived, but the exceptions to the conclusions of law on the facts found fully present the questions relied on by appellants.

The substance of the finding of facts, as far as material to the questions discussed in the briefs, is as follows: that appellant Vandalia Coal Company is a corporation organized under the laws of the State of New Jersey and doing business in the State of Indiana; that on October 19, 1904, appellee executed to appellant, William W. Ray, a lease, the substance of which is as follows: For the period of fifteen years, 40 acres of real estate in Clay County, Indiana,

leased for the sole and only purpose of digging, mining and removing therefrom coal, clay and other minerals, lying below the surface, "unless the minable coal in said land and adjoining land be sooner exhausted"; the lessee to make search for coal and, if found in sufficient thickness, quality and quantity, and roof of sufficient strength, in the opinion of the lessee, to justify mining, then to sink a shaft to the bed of the coal and to have the same ready for operation within six months from the date of the lease and to pay the lessor for coal of a certain grade, ten cents per ton and for inferior grades seven cents per ton, between the 16th and 25th of each month, for coal mined the preceding month. The lessee after one year from date of lease was to mine sufficient coal to "make the royalty thereon amount to \$600 annually, or in default thereof to pay said sum each year, after the completion of a shaft or the commencing of mining operation in said land, and any sum paid in excess of royalty of coal mined shall be treated as advanced royalty, and shall be deducted out of any excess over \$600 in any year or years thereafter; provided, however, that said annuity shall not be payable until after the expiration of one year from the completion of a shaft or the commencement of mining operations in said lands; and further provided that upon the failure of said second party to sink said shaft or begin mining operations within the time hereinbefore stipulated party of the second part agrees to pay at the expiration of said time the sum of \$600 to said first party as advanced royalty to be deducted as hereinbefore provided. The party of the second part reserves the right to abandon said land and mining at any time when on account of thinness of coal or poor roof." That the lessee entered upon said real estate and made search for coal during the months of November and December, 1904, and entered into an arrangement with the Asherville Mining Company by which it sank a shaft to the bed of coal underlying the surface of the land; that the shaft and tippie

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erected were completed on January 16, 1905, and thereupon the company began to dig and mine coal from said land, and continued so to do until August of that year; that thereafter the Central Coal Company acquired an interest in the lease and on August 9, 1905, Ray and both of said companies executed an assignment of the lease to the appellant, Vandalia Coal Company, which assignment and conveyance was duly accepted on August 28, 1905, and said appellant entered into possession of said mine and the property connected therewith; that from the time of said assignment the appellant, Vandalia Coal Company, continued to operate the mine until December 24, 1907, when it ceased operating the same and no coal has since been mined or removed therefrom; that in January, 1908, the Vandalia Coal Company removed the cars, rails and other personal property from said mine and dismantled the tippie and buildings; that on said date, the coal varied in thickness in different entries and parts of said mine, from two feet two inches to three feet two inches and in the entries was getting thinner as the work progressed; that the coal in some of the pillars between the main entry and air course was three feet thick and there was coal three feet thick in the south and southeast parts of the land covered by the lease; that coal as thin as two feet six inches can be mined in the usual method of mining without taking up any bottom, except three feet for road way, but with coal thinner than two feet six inches it is necessary to take out the bottom in order to operate successfully; that the roof of said mine had occasional "water-slips" but by usual and ordinary methods of propping could be made reasonably safe; that the coal in the mine more than two feet six inches in thickness could have been mined and taken out by the usual and ordinary methods of mining; that the quality of coal in the mine was a good hard block coal except the upper nine inches which was soft and of an inferior quality, by reason of which the coal graded on the market as No. 3 and sold for from ten

to twenty cents less per ton than first grade block coal; that the clay bottom under the coal was soft and made it difficult to support the roof; that at all times while the mine was operated, it was operated at a substantial loss, though the lessees exercised diligence and careful management; that by diligence and careful management with ordinary facilities under ordinary market conditions, the mine could not be operated so as to yield a profit to the operator; that all royalties and annuties were paid in full to January 16, 1907; that the year beginning January 16, 1907, the Vandalia Coal Company mined coal sufficient to make the royalty amount to \$245.86 which amount was paid; that from August 28, 1906, to January 16, 1907, the Vandalia Coal Company mined coal sufficient to make the royalty amount to \$573.29 which amount was paid; that during the year beginning January 16, 1906, sufficient coal was mined to make the royalty amount to \$838 which amount was paid to appellee by said company.

Upon the foregoing facts the court stated its conclusions of law as follows: (1) there is due the plaintiff the sum of \$354.14 as unpaid annuity for the year beginning January 16, 1907, which with interest from January 16, 1908, amounts to \$414.35; (2) that by the several assignments of said lease, the appellant Vandalia Coal Company became primarily liable for the payment of the royalties and rentals due under said lease and appellant Ray, as between the parties, became surety for the payment of the amount due as aforesaid; (3) for the collection of the judgment, the property of the appellant Vandalia Coal Company should first be levied upon and if the judgment is not satisfied from such levy then levy should be made upon the property of said Ray.

Appellants duly excepted to each conclusion of law. Such exceptions, for the purposes of the appeal, concede

2. that the facts are fully and correctly found. Appellants contend that the lease is ambiguous and should

be construed in the light of the situation of the parties, the custom relating to coal mining and in accordance with equitable principles. The particular point in controversy

relates to the payment of the minimum annual rental

3. of \$600. Appellants contend that the lease should

be so construed as to hold that the parties intended that the rental should average \$600 per year and that if coal was mined in one year so as to make the royalty for that year exceed \$600 and in any succeeding year the amount actually mined made the royalty less than \$600, the operator should have credit for the amount previously paid in excess of \$600, though such excess was for coal actually mined and paid for at the price per ton named in the lease. We find no ambiguity in the lease. By its terms, the only instance in which the lessee may have credit for money previously paid, arises when he has paid the minimum annuity of \$600, but has not mined sufficient coal to amount to that sum, according to the rate of royalty specified in the lease, and thereafter in some succeeding year mines sufficient coal to make the total royalty for that year exceed \$600, in which event he may credit on such excess the difference between the amount of royalty for coal actually mined in such previous year, and \$600 actually paid, but in no instance can he have credit for an amount paid in excess of \$600 for coal actually mined. In con-

struing any instrument, the first duty of the court is

4. to examine the instrument itself and if from such an

examination of the whole instrument, the language employed expresses a definite meaning involving no absurdity or contradiction between different parts of the instrument, then there is no necessity for resorting to extrinsic facts to arrive at the intention of the parties, and the meaning apparent from the language so employed will be enforced as the intention of the parties. *Blythe v. Gibbons* (1894), 141 Ind. 332, 344, 35 N. E. 557; *Warrum v. White* (1908),

171 Ind. 574, 577, 86 N. E. 959; *Louisville Underwriters v. Durland* (1889), 123 Ind. 544, 549, 24 N. E. 221, 7 L. R.

A. 399. In this instance, the relation of the parties,

3. the subject-matter, the consideration and the object of each of the contracting parties are so clearly and definitely expressed, as to bring the instrument within the rule above announced. The lease fixes the rate of royalty and provides a minimum annual rental or annuity. The amount to be paid is primarily determined by the royalty specified and the amount of coal mined in any given year, subject to the condition that after the first year, if the coal mined in any single year does not amount to \$600, the lessee shall pay that sum as a minimum rental for the leased property. There is the further condition clearly expressed that if \$600 is paid for any such year, when at the rate of royalty sufficient coal has not been mined to equal that sum, the excess payment above the amount actually mined may be applied in the succeeding year as a credit for coal actually mined in such year in excess of the quantity necessary to produce the minimum annual rental of \$600, at the specified royalty. The operator may in a succeeding year obtain credit for an amount previously paid in excess of the sum due on the royalty basis for coal actually mined, but in no event can he obtain credit for payments previously made for coal actually mined and obtained by him.

From the finding and conclusions of law, it is apparent the court deducted from \$600 or the minimum annual rental, the amount actually paid for the last year's operation,

5. and gave judgment for the balance of the \$600 and refused to give credit for any excess of \$600 paid in any previous year for coal actually mined at the specified royalty. This was in strict accordance with the terms of the lease. The court cannot make a new contract for

6. the parties, and in the absence of fraud, can only give effect to the contract actually entered into. This is the rule as to all contracts. If the contract is ambiguous,

extraneous matter is considered, not to change the contract but to ascertain and give effect to the original intention of the parties.

Appellant contends that the case must be governed by a line of decisions which deal with cases where there was a failure to find coal or ore to be mined or where there

7. was a failure after operation had been begun and for that reason operation was abandoned. The finding of facts determines this phase of the case. Coal was found, the mine was operated, the coal was not exhausted when operations ceased, and there is nothing claimed except the balance of the annuity for the year of actual operation. True, the finding shows that the mine could not be operated at a profit, but this affords no ground for a refusal to pay the minimum rental while the mine was actually operated. *McDowell v. Hendrix* (1879), 67 Ind. 513; *Watson Coal, etc., Co. v. Casteel* (1881), 73 Ind. 296; *Cottrell v. Smokeless Fuel Co.* (1906), 148 Fed. 594, 78 C. C. A. 366, 9 L. R. A. (N. S.) 1187; *Ridgely v. Conewago Iron Co.* (1893), 53 Fed. 988; *Barringer and Adams, Mines and Mining* 108, 173; *McIntyre v. McIntyre Coal Co.* (1887), 105 N. Y. 264, 11 N. E. 645. What would be the rights of the parties, within the term of this lease, if the mine were abandoned for insufficiency of quantity or because of inferior quality of coal, or want of profit to justify operation, is not involved in this appeal and upon that question we express no opinion.

The court did not err in its second and third conclusions of law. 8. *Jordan v. Indianapolis Water Co.* (1902), 159 Ind. 337, 347, 64 N. E. 680; *McDowell v. Hendrix, supra*, 518. The amount of damages allowed is in accordance with the facts found. We find no error in the record. Judgment affirmed.

NOTE.—Reported in 101 N. E. 1047. See, also, under (1) 3 Cyc. 388; (2) 38 Cyc. 1992; (3) 27 Cyc. 722; (4) 9 Cyc. 577; (6) 9 Cyc. 577, 587.

HEATON ET AL. v. GRANT LODGE, No. 335, INDEPENDENT ORDER OF ODD FELLOWS.

[No. 7,984. Filed December 10, 1913.]

1. **APPEAL.—Questions Reviewable.—Motion to Modify Judgment.**
—A trial court is entitled to know on what ground a motion to modify a judgment is based, hence no question is presented on appeal under an assignment of error in the overruling of such a motion, where no reasons were stated in such motion for the modification asked. p. 103.
2. **JUDGMENT.—Modification.**—A motion to modify a judgment will not lie, where the effect of the modification would be to completely change an adverse judgment to one favorable to the party asking such modification. p. 103.
3. **QUIETING TITLE.—Proof Required.—Burden.**—By a complaint in ordinary form to quiet title, plaintiff assumes the burden of proving not only his title to the real estate in controversy, but that the defendant is, without right, claiming and asserting some title to or interest in such real estate adverse to that of plaintiff. p. 107.
4. **MORTGAGES. — Foreclosure. — Interests Barred. — Rights Under Lease for Term of Years.**—While a judgment by default foreclosing a mortgage against one who was properly made a party to the action, and duly served with process, and required to answer as to any interest he might have or claim in the premises, will be conclusive as to any prior claims of interest or title adverse to the plaintiff, only claims of interest or title made by such party in or to the property which is the subject of the foreclosure are thus concluded, and such a suit would not challenge him to answer or defend against a claim of interest in some other or different property from that covered by the mortgage in suit; hence the rights of the occupant of a building erected for its use under a contract which in effect was a lease for a term of years, who joined in the execution of a mortgage on the premises, were not barred by a default judgment in foreclosure of the mortgage, where the complaint in the foreclosure suit merely described the real estate, and neither it, the mortgage, nor the note in any way mentioned such contract. pp. 107, 109.
5. **LANDLORD AND TENANT.—Lease.—Nature of Contract.—Personal Property.**—A lease for a term of years is an encumbrance against the possession of real estate, rather than against the title thereto, and is construed as personal property and not real estate. p. 108.
6. **MORTGAGES.—Property Subject.—Leases.**—A lease for a term of years may be mortgaged, and may be included in a mortgage given

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on the real estate which it covers, but, in order that it may be so covered and included in a mortgage, it must appear from the mortgage that the parties intended to so include it. p. 109.

7. **LANDLORD AND TENANT.—Lease.—What Constitutes.**—A contract between the owner of a lot and a fraternal order that the former would construct a one-story building on his lot so that the latter could erect a second story to cover it and a similar building to be erected on an adjoining lot, and that in consideration for the erection of the second story the owner of such lot leased and rented the second story to such order for a period of ninety-nine years, gave to the latter no title or interest in the real estate, but was merely a lease for a term of years. p. 109.

8. **MORTGAGES.—Assumption of Payment.—Deed.—Construction.**—Where a deed conveying land to plaintiff recited that “the grantors convey to the grantee all shelving, gas fixtures, except * * * this conveyance is made subject to a mortgage held by * * *, Also street assessments against the lots for street improvements which grantee agrees to assume.” the grantee must be held to have assumed the payment of the mortgage, since the effect that might otherwise have prevailed from the fact that the word “also” in the provision for the assumption of street assessments began with a capital is nullified by the fact that it is preceded by a comma, and that the language is fairly open to the construction that the payment of the mortgage was assumed. p. 110.

9. **SUBROGATION.—Foreclosure of Mortgage.—Purchase at Foreclosure Sale.**—Where a mortgagor conveyed land, and his grantee assumed the payment of a mortgage thereon, the grantee could not, by suffering the mortgage to be foreclosed and buying in the title acquired by a purchaser at the foreclosure sale, acquire additional rights as against the right of possession by a tenant of the mortgagor under a lease for years, who was made a party to the foreclosure suit and defaulted. p. 110.

10. **MORTGAGES.—Rights of Purchasers at Foreclosure Sale.—Estoppel.—Effect as to Coparties.—Appeal.**—Where an appellant, claiming under a purchaser at a foreclosure sale, was by virtue of a prior deed from the mortgagor in which he assumed the payment of the mortgage, estopped from asserting any rights superior to those of the mortgagor as against the right of possession by a tenant of the mortgagor under a lease for years, who with the mortgagor was defaulted in the foreclosure suit, such estoppel operates to prevent a reversal as to his coappellants, claiming under such purchaser at the foreclosure sale, who, on the theory that they were tenants in common with him, joined him in an action against the tenant of such mortgagor to quiet their title. p. 111.

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11. QUIETING TITLE.—*Burden of Proof.*—*Cotenants.*—A tenant in common, by joining another in an action to quiet their common title, undertakes the burden not only of proving title in himself, but also title in his cotenant. p. 111.

From Jay Circuit Court; *John W. Macy*, Special Judge.

Action by Wait M. Heaton and another against Grant Lodge, No. 385, Independent Order of Odd Fellows. From a judgment for defendant, the plaintiffs appeal. *Affirmed.*

Frank H. Snyder and *Whitney E. Smith*, for appellants.
D. F. Taylor and *Charles C. Weimer*, for appellee.

HOTTEL, J.—This is an action begun by appellants Wait M. Heaton and his wife, Viola A. Heaton, against the appellee Grant Lodge, to quiet appellant's title to a lot or tract of real estate in the town of Mt. Vernon (now Redkey), Jay County, Indiana, to wit: "A part of lots 7 and 8, in block 1, in the town of Mt. Vernon (now Redkey) bounded as follows: Beginning at the southwest corner of said lot 7, and running thence east 23 feet; thence north 95 feet; thence west 23 feet; thence south 95 feet to the place of beginning." The issues of facts were tendered by a complaint in one paragraph and a general denial. Before trial, Viola A. Heaton died and her children Robert S. and Alice C. Heaton were substituted as plaintiffs. There was a trial by the court and a general finding and judgment for appellee. Appellant Wait M. Heaton filed a separate motion for new trial which was overruled. Appellants Robert S. and Alice C. Heaton filed a motion to modify the judgment and also their separate and several motions for new trial. These motions were each overruled. Exceptions were properly saved to the several rulings, and they are each separately assigned as errors by the respective parties against whom they were made, and are, by them respectively, relied on for reversal.

It is enough to say with reference to the ruling on the motion of appellants Robert S. and Alice C. for a modifi-

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cation of the judgment, that no available error is

1. presented by such motion for either of two reasons:

(1) Such motion states no reason for the modification asked, and the trial court was entitled to know on what ground the motion was based. 1 Hogate, Pl. and Pr. §871; *Hormann v. Hartmetz* (1890), 128 Ind. 353, 358, 27 N. E. 731; *Evans v. State* (1898), 150 Ind. 651, 655, 50 N. E. 820; *Borrer v. Carrier* (1904), 34 Ind. App. 353, 372, 73 N.

E. 123. (2) The effect of the modification would

2. have been to change the judgment completely from one adverse to those asking the modification to a judgment in their favor, and no error results from overruling a motion asking such a modification. *Strange v. Tyler* (1883), 95 Ind. 396, 397; *Dorsey v. Dorsey* (1902), 29 Ind. App. 248, 250, 64 N. E. 475. This must be true because, in deciding such motion, the court cannot look beyond the finding and the pleadings (*Furry v. O'Conner* [1891], 1 Ind. App. 573, 580, 581, 28 N. E. 103; *Shaw v. Newsom* [1881], 78 Ind. 335, 338,) and if the finding should have been in favor of such appellants, instead of against them, it must follow that such finding would not be sustained by sufficient evidence, and would be contrary to law, and hence such error would be presented by the motion for new trial.

We next consider the question presented by the motion for new trial made by appellant Wait M. Heaton. It is insisted by the appellant that the decision of the trial court against him is not sustained by sufficient evidence. There is little or no dispute in the evidence. The facts disclosed by it are substantially as follows: on February 15, 1894, Martha F. Paxon, widow of Pierce I. Paxon, deceased, who was then the owner of said real estate above described and other real estate adjacent thereto, by her warranty deed conveyed to Charles E. Walker and his wife Isabelle Walker, said lot above described and on the same day conveyed to appellee Grant Lodge a lot of the same dimensions immedi-

ately east of and adjacent thereto. On the same day, said Walker and Walker and appellee, Grant Lodge, by and through its trustees, entered into a written agreement wherein they recited that they were the respective owners of said two adjacent lots and that they mutually desired to erect a substantial two-story brick building thereon with brick partition wall as high as the first story, on the line dividing said lots and provided for the erection, use, occupancy and lease of said building and the terms and conditions thereof in part as follows:

“The party of the first part (Walker and Walker) covenants and agrees to put in good, suitable and substantial foundation and complete a good and substantial brick building on his said ground to be twenty-three feet (23) wide and not less than seventy-five (75) feet long to be built as high as and constituting the first story including good and suitable joists on the top thereof. The walls of said story to be of suitable material and thickness to properly support another story on the top thereof: Provided, however, that the partition wall hereinbefore mentioned shall be thirteen inches thick with a proper and suitable foundation thereunder, which wall and foundation shall be constructed by both of said parties each bearing one-half of the expense thereof. And the party of the second part covenants and agrees to construct a like building and of like dimensions on their said ground and to assist in constructing said partition wall and its foundation bearing one-half the expense thereof and that they will construct and complete a second story on said building serving as a second story for both the portion built by first and second parties. Second party to properly and substantially roof said building and to put a good and proper front in said second story suitable for such building and bear all the expense of said second story. The fronts of the two lower stories alike. In consideration whereof said first party has leased and rented and does hereby lease and rent unto said trustees and their successors for the use of said lodge and their grantees and assigns the second story so to be constructed over the portion of said building to be built by said first party as aforesaid for and during the term and period of ninety-nine years from and after the date hereof, renew-

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able at the option of second party their grantees and assigns forever on their compliance with the terms and conditions on their part to be done and performed herein stipulated.”

This agreement was recorded February 16, 1894. On March 22, 1894, Walker and Walker and said Grant Lodge executed a mortgage on said Walker and Walker lot above described to “No. Two Indiana Mutual Building and Loan Association” of Indianapolis, to secure a note of date March 1, 1894, for \$1,000 signed by same parties. On October 20, 1894, a mortgage in the same form by same parties and to same association was executed to secure a second note given by same parties for \$300. On February 18, 1897, there was filed in the Jay Circuit Court by said building and loan association a suit to foreclose said mortgages. Said lodge was made a defendant to said foreclosure proceeding and by and through its trustees was summoned to appear thereto, and was defaulted. On April 1, 1897, a judgment and decree of foreclosure was entered by said court in said action. On March 11, 1897, Walker and Walker, by warranty deed conveyed said real estate to Wait M. Heaton and John M. Sims which deed contained the following provision:

“Also the grantors convey to the grantees all the shelving, gas fixtures, except regulator and other fixtures belong to said property, this conveyance is made subject to a mortgage held by the Indiana Mutual Building and Loan Association of Indianapolis, Indiana, also the street assessments against said lots for street improvements which grantee agrees to assume.”

On September 17, 1899, Wait M. Heaton and John M. Sims obtained in the Jay Circuit Court a judgment quieting title in them to the lot here involved as against any and all claims of Charles E. and Isabelle Walker, said judgment being obtained on a cross-complaint filed in an action brought by Charles E. Walker et al. On November 13, 1899, the sheriff of Jay County conveyed by deed said real estate to

Viola A. Heaton and Jane E. Sims. This deed recited among other things that said judgment had been obtained by said building and loan association at the March term, 1897, of said Jay Circuit Court together with “a decree for the sale of all the interest, estate, right and title of the defendant Charles E. Walker et al. in and to certain real estate” (describing the real estate here involved); that on April 7, 1897, a copy of said decree was issued and delivered to the sheriff of said county directing him to sell; that after giving notice and after offering rents and profits, he then “offered at public auction all the rights, title and interest in fee simple of the said Charles E. Walker et al. in and to said real estate,” and the said building and loan association bid the same in; that on May 1, 1897, such sheriff executed to said association a certificate of purchase for said real estate; that on February 2, 1898, for a valuable consideration, the said association “did sell, assign, transfer and set over to Viola A. Heaton and Jane E. Sims, the certificate of purchase”; that to confirm to said Viola A. Heaton and Jane E. Sims the sale so made, the said sheriff in consideration, etc., “hath granted, bargained, sold and doth by these presents, grant, bargain, sell convey and confirm to the said Viola A. Heaton and Jane E. Sims heirs and assigns forever all the following real estate * * * in as full and ample a manner as the same was held by Charles E. Walker et al. immediately before the execution of the mortgage mentioned in said decree foreclosing the same.” This deed was acknowledged March 6, 1900, and on the same day filed for record. On January 28, 1905, Jane E. Sims, by warranty deed conveyed an undivided one-half of said real estate to Wait M. Heaton, which deed was recorded June 6, 1906. Jane E. Sims was the half-sister of Viola A. Heaton, and Viola A. Heaton was the wife of Wait M. Heaton. Viola A. Heaton died on April 25, 1908, and left surviving her as her heirs her said husband Wait

M. Heaton and two children Robert S. and Alice C. Heaton, the coappellants of Wait M. Heaton.

The appellants, by their complaint, took upon themselves the burden of proving not only title in themselves to the real estate in controversy, but also that the appellee

3. was, without right, claiming and asserting some title to or interest in said real estate adverse to that of appellants. *Cuthrell v. Cuthrell* (1884), 101 Ind. 375, 377, 378; *Davis v. Commonwealth, etc., Co.* (1904), 141 Fed. 711, 733, 734; *Head v. Fordyce* (1860), 17 Cal. 149, 152; 12 Ency. Ev. 607.

The only proof of any claim made by appellee to any right in, or to, said real estate was that of its claim to possession under said written agreement between it

4. and Walker and Walker. In this connection it is insisted by appellants, in effect, that all right of appellee including its right to possession, under said agreement, was foreclosed in the said foreclosure proceeding to which it was made a party and suffered a default, and that by such default it has estopped itself from asserting any claim under the agreement. It is true that "in an action to foreclose a mortgage, a judgment by default against one who was properly made a party to the action, and duly served with process, and required to answer as to any interest he might have or claim in the premises will be conclusive as to any prior claims of interest or title adverse to the plaintiff." 1 Wiltsie, Mortg. Foreclosures (3d ed. by Spurr & Rogers) §502. See, also, *Maynard v. Waidlich* (1900), 156 Ind. 562, 571, 60 N. E. 348; *Adair v. Mergenthim* (1887), 114 Ind. 303, 306, 16 N. E. 603; *Miller v. Hardy* (1891), 131 Ind. 13, 18, 29 N. E. 776; *Barton v. Anderson* (1885), 104 Ind. 578, 581, 582, 4 N. E. 420; *Pilliod v. Angola R., etc., Co.* (1910), 46 Ind. App. 719, 726, 91 N. E. 829. It must be obvious, that this rule can have application only to claims of interest

or title made by the defaulted party in or to the property which is the subject of the foreclosure. Such a suit would not challenge such party to answer or defend against a claim of interest in some other or different property from that covered by the mortgage in suit. In the case at bar, the only property mentioned in either of the mortgages or in the complaint for foreclosure was the real property owned by Walker and Walker. The appellee had signed the mortgages to such real estate and the notes which the mortgages were given to secure, and was therefore a proper party to the suit and by the default which it permitted to go against it, lost any title or interest it may have then had in or to such real estate. Said written agreement was not mentioned in the mortgages, or either of them, or in the complaint for their foreclosure, nor was there any averment in such complaint to the effect that appellee was claiming any right, title or interest in said real estate adverse to that of the mortgagee. The complaint in that suit challenged appellee to answer and defend simply and solely as one of the signers of such notes and mortgages. Hence we are called on to determine whether appellee's claim, under the agreement, is such as is covered by the principle above announced, and this, we think, depends on whether such agreement created a title or interest in the real estate in question, or amounts to no more than a lease for years. We say this because as before indicated, the foreclosure proceedings as against appellee had the effect only of cutting off whatever equity of redemption it may have had in the mortgaged premises and estopped it from afterward asserting any claim or interest in the real estate that would have furnished it such right to redeem from such sale. A lease for a term of

5. years is not of this character. It is an incumbrance against the possession of real estate, rather than against the title thereto, and is construed as personal property and not real estate. *Shipley v. Smith* (1903), 162 Ind. 526, 70 N. E. 803; *Mark v. North* (1900), 155 Ind. 575, 57

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N. E. 902. It may, of course, be mortgaged and may
6. be included in a mortgage given on the real estate
which it covers; but, in order that it may be so covered and included in such mortgage, some evidence of the intention of the parties to include it, must appear in the mortgage. Nothing of this kind appears in either
4. of the mortgages here involved or in the complaint for their foreclosure. Appellee's lease was of record at the time the mortgages in question were executed and if the building and loan association had sought to include it in the property covered by its mortgages, it could have very easily done so, but nothing appears on the face of either
of the mortgages indicating any such intention.

The complaint in the foreclosure proceedings, by its averments, required appellee to answer only as to such interest as it might have in the equity of redemption in the mortgaged real estate, and hence the decree of sale thereunder of such mortgaged property could have no further effect than to adjudicate appellee's title and interest in *said real estate* and estop it from ever after asserting any such title or interest therein. This the appellee concedes and in effect insists that it is not now claiming or asserting any right or title in the real estate, but asserts only the right to possession under its lease. Hence it must follow that, un-

7. less the agreement before set out must be construed as creating and giving to appellee some title and interest in said real estate rather than creating a lease for a term of years only, appellee's rights thereunder will not be affected by such foreclosure proceeding. We think that such agreement gave to appellee nothing more than a lease for years, and hence a right to possession only of said real estate; but, even if it be conceded that such agreement gave to appellee some interest or title in said real estate, still appellant Wait M. Heaton is in no position to ask a reversal of the judgment below. We say this because, notwithstanding appellants' contention to the contrary, we think the evidence

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warranted the trial court in concluding that Wait M. Heaton by his deed from Walker and Walker, assumed and agreed to pay said mortgage indebtedness against said real estate.

Appellant Wait M. Heaton insists that by the provision in said deed, which we have before set out just as it appears

in the record herein, he assumed and agreed to pay

8. only the assessments for street improvements on said lot. He bases his contention on the fact that the word "also" in said provision begins with a capital letter and hence is the beginning of a new sentence. The answer to this contention is that such word is preceded by a comma. The language of the deed itself is fairly open to the construction that appellant Wait M. Heaton not only assumed and agreed to pay the assessment for street improvements, but also the mortgage indebtedness. The after conduct of the parties, together with appellants' long acquiescence in appellee's possession, and laches in bringing this action, was additional evidence warranting the trial court in inferring that such was the intent of the parties to such agreement. If we are correct in this conclusion, appellant, Wait M. Heaton, has nothing on which to ground his contention that the decision of the trial court against him is not sustained by sufficient evidence.

It would not be seriously contended that Walker and Walker could successfully resist appellee's claim to possession under said agreement it had with them, and we

9. know of no principle of law that, under the evidence in this case, would give Heaton any title or interest to such real estate greater than, or different from, that of his said grantors, and he certainly should not be allowed to profit by a conveyance received from the grantee of a purchaser at a foreclosure sale of a mortgage given to secure a debt which he had himself assumed and agreed to pay. See *Todd v. Oglebay* (1902), 158 Ind. 595, 599, 64 N. E. 32; *Oglebay v. Todd* (1906), 166 Ind. 250, 76 N. E. 238, and authorities there cited. As the grantee of the equity of re-

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demption from Walker and Walker, the appellant, Wait M. Heaton, can occupy no better position than Walker and Walker would occupy if they had brought this action. *Miller v. Williams* (1899), 27 Colo. 34, 42, 59 Pac. 740; *Fritts v. Palmer* (1889), 132 U. S. 282, 289, 10 Sup. Ct. 93, 33 L. Ed. 317.

Appellants Robert S. and Alice C. Heaton also rely on the insufficiency of the evidence to sustain the decision of the court as to them, and what we have said

10. in our discussion of this ground of the motion for new trial of appellant Wait M. Heaton on the subject of the foreclosure proceeding estopping appellee from asserting its claim under said agreement applies with equal force to the contention of Robert S. and Alice C. This would prevent a reversal of the judgment as to them. We may also add that, under the complaint in this case, Robert S. and Alice C. Heaton are in no better position than their coappellant in so far as they are affected by the last question above discussed. The mother of these appellants under whom they claim, joined with their coappellant, Wait M. Heaton, and filed a complaint which proceeds on the theory that she and Wait M. Heaton, as tenants in common, were entitled to have their title quieted to the real estate in controversy. Upon their mother's death, Robert S. and Alice C. were substituted in her stead. By joining with Wait M. and asking

11. that such common title be quieted, said appellants undertook the burden of proving not merely title to the respective parts owned by them but they also assumed the burden of proving title in their coappellant who they allege is one of the owners of such common title. The common title thus jointly asserted by all the appellants, could be no better than the title to either of the several parts which constituted it, and hence appellants' right to recover under the complaint, was no better than, but was identically the same as that of their coappellant, Wait M. Heaton, and

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that which would prevent his recovery would likewise prevent their recovery.

We find no reversible error in the record, and the judgment below is therefore affirmed.

NOTE.—Reported in 103 N. E. 488. As to amendment of pleadings, see 12 Am. Dec. 351; 62 Am. St. 233. As to right of subrogation, see 99 Am. St. 474. See, also, under (1) 23 Cyc. 876; (2) 23 Cyc. 868; (3) 32 Cyc. 1369; (4) 27 Cyc. 1794; (5, 7) 24 Cyc. 27 Cyc. 1040; (8) 27 Cyc. 1344; (9) 27 Cyc. 1435; (10) 16

MORRIS ET AL. v. REYMAN, GUARDIAN

[No. 8,063. Filed December 10, 1913.]

1. PAYMENT.—*Mistake.—Evidence.—Sufficiency.*—Where plaintiff testified that, on the delivery to him of checks in a certain sum in payment of a note of a less amount, he cancelled the note and delivered it to defendant together with what he believed to be correct change, that thereafter on the same day he discovered a shortage in his cash and discovered from a memorandum that he had made a mistake in calculating the amount due on the note that he had made a mistake in subtraction, thus tracing such shortage to payment of defendant, a verdict for plaintiff had some foundation to support it, and cannot be disturbed on appeal on the ground that the evidence was insufficient. p. 114.
2. PAYMENT.—*Definition.*—In legal contemplation a payment is a discharge in money, or its equivalent, of an obligation or debt owing by one person to another. p. 114.
3. BILLS AND NOTES.—*Payment.—Evidence.—Mistake.*—Where plaintiff delivered to plaintiff of checks in a certain sum in payment of a note for less sum, and his acceptance thereof for the purpose of satisfying such note out of the proceeds of the checks, constituted *prima facie* a payment of the note and a discharge of the note, where it appeared that plaintiff, by mistake in deducting the amount of the note from the amount of the checks, paid defendant a greater sum than the balance due him, there was no amendment of the note so as to prevent a recovery of the amount paid to defendant, since to constitute such payment the defendant was bound to allow the sum due on the note to remain with plaintiff, and, even though plaintiff's failure to retain the correct amount was caused by his own error, it was defendant's duty to correct the mistake. p. 115.
4. GUARDIAN AND WARD.—*Payments by Guardian.—Evidence.—Appeal.*—In an action by a guardian to recover money erroneously paid to defendant as change on the latter's payment of

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due to plaintiff's ward, where it appears from the record on appeal that plaintiff testified that he was such guardian, and that defendant's counsel admitted that plaintiff had purchased the note from the original payee before maturity, the judgment for plaintiff cannot be reversed on the ground that the proof does not support the allegations of the complaint, since, though there was no other evidence on the subject, it cannot be said that the jury could not have properly inferred from the evidence given, and the conduct of the parties, that plaintiff purchased the note as guardian with the funds of his ward. p. 117.

5. *APPEAL.—Presenting Questions Below.—Failure of Proof.*—A judgment will not be reversed for want of direct evidence to establish an essential fact which the jury may have inferred, where appellant failed to contest such fact at the trial. p. 118.

From Washington Circuit Court; *Thomas B. Buskirk*, Judge.

Action by Millard Reyman, as guardian of Anna Craycraft, a person of unsound mind, against Rolla E. Morris and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Elliott & Houston, for appellants.

James L. Tucker, for appellee.

IBACH, J.—Millard Reyman, as guardian of Anna Craycraft, a person of unsound mind, brought this action by a complaint to recover on a note executed by defendants to one Mat Kinney and by him transferred to plaintiff, which note it was alleged, was delivered by mutual mistake of plaintiff and defendant Morris to said defendant as paid, whereas in truth and in fact there was due plaintiff as guardian the sum of \$100. Plaintiff recovered judgment for \$100.

The errors assigned and argued question the court's action in overruling appellants' motion made at the close of plaintiff's evidence, to instruct the jury to return a verdict for defendants, and in overruling appellants' motion for a new trial, on the grounds that the verdict of the jury is contrary to law, and is not sustained by sufficient evidence.

The evidence showed that defendants had executed a note to Mat Kinney for \$135, that Millard Reyman was the guardian of Anna Craycraft; that he purchased said

1. note for \$135 before maturity from Mat Kinney; that when the note was due, defendant Morris went to the bank of which Reyman was cashier, and told Reyman that he wanted to pay off this note, and tendered to him three checks amounting to \$382.25 to pay off the note, which amounted to \$139.09; that Reyman paid Morris an amount which he believed to be the difference between the amount of the checks and the amount due on the note, and marked the note paid and delivered it to him. Reyman testified that afterwards on that same day he discovered that he was \$100 short in his cash, and was able to trace the shortage to the fact that in making change for Morris he had paid him \$100 too much, as shown by a memorandum used by him in calculating the amount due on the note which was to be deducted from the amount of the checks presented, and in which calculation he had made a mistake in his subtraction, "and that he brought this action for the purpose of collecting the hundred dollar mistake he had made." Morris denied that he was given any more than the correct amount of change, and denied receiving the \$100 for which the suit was brought. The jury by its verdict, however, found against Morris on that point, and as there is evidence to support such conclusion, we can not disturb it as regards that phase of the case.

The principal question is, Do the facts disclosed by the testimony of Reyman show a payment of the note, in which case there could be no recovery in a suit on the note, and appellee's proper remedy would have been a suit for money had and received, or was there merely a part payment of the note, leaving an unpaid balance recoverable in an action

like the present? The word payment has a well-

2. understood meaning, and in legal contemplation payment is the discharge in money or its equivalent of

an obligation or debt owing by one person to another. 3 Elliott, Contracts §1925. So under the facts of this case,

the delivery to appellee of the particular checks,

3. largely in excess of the amount due on the note

and his acceptance thereof for the purpose of

satisfying such note out of the proceeds of the checks,

paid in due course, would constitute, *prima facie*, a pay-

ment of the note and a discharge of the debt. Does the

fact, however, that appellee made a mistake in deduct-

ing the amount due on the note from the amount of

the checks and in paying the difference to appellant

Morris, gave him a larger amount than the balance due

him, change the situation and constitute the transaction a

partial payment only of the note, and a discharge of the debt

only to the extent of the sum retained by appellee? It must,

we think, be conceded that the delivery of the checks, the

receipt of the same as so much cash, the payment of the

checks, the cancellation and surrender of the note and the

making of change are all to be taken as a part of one and the

same transaction. It required the doing of all of these

acts to consummate the purpose and real intention of the

parties, a complete and absolute payment of the note. Con-

sequently, it cannot be said legally that there was actual

payment if the payee through a mistake on his part or

through fraud or mistake on the part of the payor, did not

retain an amount of money equal to the amount of the debt,

the sum which appellant well knew he was expected to pay

and which appellee supposed he had retained. To constitute

a payment of the note it was the duty of the payor not only

to deliver to the payee a sufficient sum of money to cover the

debt but it was necessary to allow it to remain with him. It

was the duty of the party making the payment to see that

he received the correct change as well as it was the duty of

the payee to make the correct change.

We can see no reason why the same rules of law should not be applied to this case as to one where counterfeit money

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had been given to pay the note, or where the payor of a note actually delivered to the payee a less amount of money than was due on the note and both parties had acted upon the belief that the amount delivered covered the amount due. *Blodgett v. Bickford* (1858), 30 Vt. 731, 73 Am. Dec. 334; *Markle v. Hatfield* (1807), 2 Johns. (N. Y.) *455, 3 Am. Dec. 446, 447; *Frontier Bank v. Morse* (1842), 22 Me. 88, 38 Am. Dec. 284, 289; *First Nat. Bank v. Buchanan* (1888), 87 Tenn. 32, 33, 9 S. W. 202, 1 L. R. A. 199, 10 Am. St. 617; *Reynolds v. French* (1836), 8 Vt. 85, 30 Am. Dec. 456; *Liesemer v. Burg* (1895), 106 Mich. 124, 63 N. W. 999. "It is set out in the Negotiable Instruments Law that: 'A negotiable instrument is discharged by the intentional cancellation thereof by the holder.' But 'a cancellation made unintentionally, or under mistake, or without the authority of the holder is inoperative; but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.' * * * where the surrender or cancellation of the instrument is induced by fraud, the maker is not released from liability; likewise where an instrument has been surrendered by mistake upon the supposition that it was fully paid, the debtor will remain liable for the balance still unpaid." 4 Elliott, Contracts §3473. See, also, Acts 1913 p. 120, §§119, 123. Though the negotiable instruments law was not adopted in this State until after the beginning of this action, yet there are no decisions of our courts in conflict with the provision of this law above set out.

In any event it seems to us that before there could be actual payment of this debt there must have been a complete discharge of it, and before there could be such discharge there must have been a full and complete performance of that which the parties undertook to do and when the maker of the note in suit carried away with him a portion of the money which should have been left with the payee, he failed

to do what his contract required of him, and although it may be said that he was able so to do on account of the mistake of the payee, yet it was a mistake of which the obligors on the note cannot take advantage, a mistake which should have been corrected at the time of the transaction, or when a demand for the return of the money was made, and not being corrected then, it must be corrected now. Indeed, it must be considered unconscionable to hold that such a transaction as is developed by the facts here would constitute a discharge of the note.

If appellant Wyman, the surety, had surrendered to the maker anything of value which might have been delivered to him for his protection on his becoming such surety on the note and he had lost any legal rights existing between himself and such maker, by reason of the note being canceled by appellee's mistake the case might require a different consideration. While we do not think the mistake of appellee would operate as a discharge of the obligation between appellee and the payor, yet such payee might, under such circumstances, be estopped to assert any further claim against the surety. See cases above cited. Appellants have presented no such conditions, however, and we are not required to consider further this phase of the subject.

It is also contended that the evidence fails to support the allegations of the complaint, in that it does not appear that plaintiff purchased the note as the guardian of Anna
4. Craycraft. It appears from the record that when plaintiff first took the stand he was asked his name, and then asked if he was the guardian of Anna Craycraft, a person of unsound mind, to which he answered that he was. It was then admitted by appellants' counsel that the witness Reyman purchased the note in question from Mat Kinney before maturity. There is no other evidence tending to show that he purchased it in his capacity as guardian. It must be admitted that there is in the record no direct evidence on the point, but we cannot say that the jury could

not have inferred properly from the evidence given the conduct of the parties the fact that plaintiff as guarantor of Anna Craycraft purchased the note in question with her funds and as there was no dispute about the matter tried at trial, the judgment should not be reversed on account of error in the instructions. The motion to direct the judgment for defendant was denied.

5. The motion was made solely on the ground that the contract was declared on a note, and the evidence showed that it was a suit on an account, if anything at all. So that at the time of the trial this contention of appellants was not presented to the court in any manner, and there is no reason to reverse the judgment for failure of proof. See *Wells v. Wells, etc., R. Co. v. Goodbar* (1882), 88 Ind. 213; *State v. State, ex rel.* (1882), 84 Ind. 433, 436.

We find no error in the actions of the court which were complained of. Judgment affirmed.

NOTE.—Reported in 103 N. E. 423. See, also, under (1) 1325; (2) 30 Cyc. 1180; (3) 30 Cyc. 1316; (5) 2 Cyc. 699.

STATE OF INDIANA, EX REL. WALBURN GOUGH ET AL.

[No. 8,176. Filed December 10, 1913.]

1. DRAINS. — *Establishment. — Negligence of Commissioners.*—Under the drainage act of 1905, Acts 1905 p. 45 providing that after certain preliminary steps the court shall proceed back to the drainage commissioners to prepare the work and make final report, and that they shall determine definitely the best and cheapest method of drainage, the location and character of the proposed work, and fix the same by metes and bounds, etc., and requiring them to assess the costs and damages, the drainage commissioners, in determining such matters, are required to exercise discretion and judgment, even though not strictly judges, are within the provision of law exempting one from liability for misconduct or default in the discharge of a judicial duty, and hence the commissioners in charge of a drainage construction were not liable for their alleged failure to exercise proper care and skill in planning and constructing the same.

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drain which, because of its grade, was worthless to plaintiff whose lands had been assessed therefor. p. 121.

From Delaware Superior Court; *Robert M. VanAtta*, Judge.

Action by the State of Indiana, on the relation of Lawrence Walburn, against Charles Gough and others. From a judgment for defendants, the relator appeals. *Affirmed.*

Elmer E. Botkin and *Silverburg, Bracken & Gray*, for appellant.

William W. Orr, Harry H. Orr and *Leonidas A. Guthrie*, for appellees.

LAIRY, C. J.—Appellant brought this action against appellees in the Superior Court of Delaware County. The trial court held the complaint to be insufficient and appellant, refusing to amend or plead over, judgment was rendered against him for costs. The only question presented on appeal is the sufficiency of the complaint. From the allegations of the complaint, it appears that appellant was the owner of certain lands in Delaware County which were in need of drainage and that in February, 1906, he and other persons filed with the board of commissioners of that county a petition for the location, establishment and construction of a ditch under and pursuant to Acts 1905 p. 456. Appellee, Gough, was at the time, the county surveyor of Delaware County, and *ex officio* drainage commissioner, and appellees, Drumm, Fimple and Watson, were sureties on his official bond. Appellee, Applegate, was at the time drainage commissioner of such county and appellees, Downing, Nash and Adams, were the sureties on his official bond.

The complaint sets out in detail the proceedings before the board of commissioners of Delaware County showing that on June 4, 1906, the petition was referred to appellees, Gough and Applegate, as drainage commissioners in accordance with the provisions of §3 of the act of 1905, *supra*, and that on May 1, 1906, they filed with the board their prelimi-

nary report in accordance with the provisions of that section; that no exceptions were filed to the preliminary report and that, after the expiration of twenty days, the board of commissioners referred the petition back to the same drainage commissioners with directions to prepare and file their final report; that on August 2 of that year, the commissioners filed their final report in accordance with §4 of the act cited and no remonstrance, objections, or exceptions were filed to such final report. As the complaint further shows, the board of commissioners of Delaware County made an order approving the report made by the drainage commissioners and confirming the assessments therein contained, and ordered that the proposed ditch be established and constructed in accordance with the specifications contained in the report. The work of drainage was referred to appellee Gough as county surveyor and drainage commissioner for construction and he afterwards collected the assessments and completed the work in accordance with the plans, specifications, grades and bench marks as set forth in said report. An assessment of \$143 was made against the lands of relator described in the complaint which assessment was paid. The lands of relator which are assessed with benefits are not reached by the ditch so constructed but the source of tributary No. 2 is within 900 feet of such lands. The bottom of said tributary at its source is on a level with the surface of the lands of relator and the tributary is not of sufficient depth to afford any outlet for drainage from such land. If proper care and skill had been exercised by the drainage commissioners in planning such ditch, so as to carry the fall of tributary No. 2 up from the main ditch, this tributary could have been planned and constructed of a sufficient depth to afford an ample outlet for relator's land. The complaint alleges that Charles Gough as surveyor in determining the depth of tributary No. 2 of such ditch took his levels, and made his surveys, observations and calculations in a careless, negligent and unskillful manner, and that

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he failed to take levels upon the lands of relator in order to determine the depth of a ditch which would be sufficient to properly drain the same, and that, in total disregard of his duties, he located the bottom of tributary No. 2 at a depth of three and one-half to four feet below the surface of the ground, whereas it could have been located at a depth of six feet below the surface and it should have been so located in order to furnish an outlet for draining the lands of relator. It is further alleged that the lands of relator lie in such a position that it is impossible to drain them by any other means except by a drain located along the line of tributary No. 2, and that in order to accomplish such drainage, it will be necessary to reconstruct such tributary for a length of 2,200 feet and that the cost of such work will be \$500. Relator further alleges that he was not skilled in the art of engineering or surveying and that it was impossible for one not so skilled to determine from the report that the ditch planned and specified therein was not of sufficient depth to furnish an outlet for draining his land; that he believed that the surveyor and drainage commissioner had carefully and skillfully planned such ditch of a sufficient depth to properly drain his land and that he relied on this belief and had no knowledge to the contrary until more than one year after such ditch had been completed.

We are called upon to determine the sufficiency of the facts stated in the complaint to constitute a cause of action against the surveyor or the drainage commissioner,

1. and this involves the question as to whether these officers can be held liable for negligence, lack of skill, or the failure to exercise proper judgment in planning a proposed ditch and preparing plans and specifications therefor when acting under an order of court by which such questions were referred to them for their determination in a proceeding for the establishment and construction of a ditch under the provisions of the statute referred to in the complaint. This statute provides that, after certain prelimi-

nary steps have been taken, the court shall refer the proceedings back to the drainage commissioners with direction that they proceed with the work and make their final report. The statute also provides that these commissioners shall determine definitely the best and cheapest method of drainage, the route, location and character of the proposed work, and fix the same by metes and bounds, courses, distances and descriptions, grades and bench marks, including all necessary arms or branches so as to provide for complete drainage of all the lands to be affected by the proposed work. They are also required to assess the benefits and damages to the tracts and parcels of land affected by the proposed improvement and to make a report under oath, to the court. The statute also provides for remonstrance against this report by any person interested and for a hearing and determination of the questions raised by such remonstrances. When the report is finally approved, the plans and specifications for the proposed work embodied therein are adopted by the court. The statute evidently contemplates that the court before which the proceeding is pending shall adopt proper plans and specifications for the proposed work before it orders the same to be established. As a means to this end, it is provided that certain questions shall be submitted by the court for determination by the drainage commissioners and among the questions so submitted and upon which they are required to report is the character of the ditch which will accomplish the proposed drainage in the best and cheapest manner, together with the plans and grades for its construction.

In determining the questions thus submitted to them, the drainage commissioners act in much the same capacity as commissioners appointed by a court to make partition of lands, or as commissioners appointed to assess damages in a proceeding for the appropriation of real estate. The determination of the questions submitted to such officers requires the exercise of discretion and judgment. It is well

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settled that no action lies for misconduct or delinquency in the discharge of a judicial duty; and, even though the officer may not in strictness be a judge, still if his duties are such as to require of him the exercise of his judgment or discretion in determining the manner of their performance, he is exempt from responsibility for a mistake in judgment or for an improper exercise of discretion. *McOsker v. Burrell* (1876), 55 Ind. 425; *Baker v. State* (1867), 27 Ind. 485; *Waldron v. Berny* (1871), 51 N. H. 136; *Bates v. Horner* (1893), 65 Vt. 471, 27 Atl. 134, 22 L. R. A. 824, and notes thereto; *Schooler v. Arrington* (1904), 106 Mo. App. 607, 81 S. W. 468; 5 Thompson, Negligence §6385. "The king can do no wrong," is an ancient and well-known maxim. The sovereign power, which in monarchies was vested in the king, is widely distributed in a government such as ours. Many officers within their respective spheres wield a part of the sovereign power and in so far as they act in the exercise of such power, they are immune from civil responsibility. Any injury which may result to a private individual is *damnum absque injuria*.

Where official duties are purely ministerial, and involve the exercise of a certain definite task leaving no room for the exercise of judgment in determining the manner of its performance, a different rule of liability applies. It has accordingly been held that where a court established a ditch and ordered it constructed according to certain plans and specifications, the commissioner to whom it was referred for construction was liable in damages for a failure to have it constructed in accordance with such plans and specifications. *Smith v. State, ex rel.* (1888), 117 Ind. 167, 19 N. E. 744. Under the facts in this case, the court in proceeding to establish the ditch in question was exercising a portion of the sovereign power of the State and so also were the commissioners of drainage while acting under the authority of the court in determining and reporting the best and cheapest method of drainage. They were required only to discharge

their duties according to the best of their ability, a mistake of judgment, they cannot be held liable. Judgment of the trial court is correct. Judgment

NOTE.—Reported in 103 N. E. 448. See, also, 14 Cyc. 104

NATIONAL FIRE PROOFING COMPANY v. SMITH, ADMINISTRATOR.

[No. 7,578. Filed November 20, 1912. Rehearing denied December 10, 1913. Transfer denied December 10, 1913.]

1. PLEADING. — *Complaint. — Theory.* — The theory of a complaint must be determined from a consideration of its leading facts and its general scope and tenor, and the theory most clearly outlined will be adopted rather than an unexplained theory that may be indicated by a consideration of parts and fragmentary statements, or by the conclusions of the pleader. p. 136.
2. PLEADING.—*Complaint.—Theory.*—A complaint framed upon a definite theory ascertainable from a consideration of its facts and its general scope and tenor, must be good upon that theory or it will be held deficient. p. 136.
3. MASTER AND SERVANT.—*Injuries to Servant.—Duty to experienced Servant.*—Before a master exposes an inexperienced servant to dangers that are not apparent to one of his experience, he is required to warn him thereof and to give him such instructions as will enable him, by the exercise of ordinary care, to avoid injury. p. 137.
4. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.*—While a servant assumes all the risks ordinarily incident to his employment, where his master temporarily requires him to perform services involving different duties and hazards not within the scope of his employment, the servant assumes only those risks which he may ascertain by the exercise of ordinary care for his own safety, and the master's failure to instruct and supervise renders him liable for injury resulting from such negligence where the servant is free from contributory negligence.
5. MASTER AND SERVANT.—*Injuries to Servant.—Knowledge of Defect or Danger.—Pleading.—Proof.*—As a matter of pleading, it is only necessary that the complaint, in a servant's action for personal injuries, should allege that the servant did not know of the defect or danger.

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alleged defect or danger in order to exclude both actual and implied knowledge on his part; but as a matter of proof to sustain such averment the plaintiff must not only show a want of such knowledge, but that it could not have been acquired by the exercise of ordinary care. p. 138.

6. **MASTER AND SERVANT.—Injuries to Servant.—Knowledge of Danger.—Assumption of Risk.**—A servant, merely knowing that there is some danger without appreciating it, does not thereby assume the risk within the meaning of the rule that debars recovery, nor does knowledge of danger necessarily show negligence on his part. p. 138.
7. **MASTER AND SERVANT.—Injuries to Servant.—Complaint.—Contributory Negligence.—Assumption of Risk.**—The complaint in an action for the death of a servant, showing the peculiar and hidden dangers incident to the work that decedent was performing, his ignorance of such dangers and his want of skill and experience in relation thereto, defendant's knowledge thereof, and its failure to warn decedent on transferring him to such work which involved dangers not incident to his employment, is not insufficient on the ground that such averments are nullified by other allegations tending to show decedent's opportunity for knowing and appreciating the danger, since such allegations do not amount to an affirmative showing that he assumed the risk or that his negligence contributed to the injury. p. 139.
8. **MASTER AND SERVANT.—Injuries to Servant.—Knowledge of Danger.—Jury Question.**—Where a servant was injured while performing work to which he had been temporarily assigned, and involving duties and dangers not incident to his regular employment, the question of whether the risks incident to his new duties were visible and could have been ascertained by him in the exercise of ordinary care, or were such as required knowledge or experience to detect, and whether he was ignorant of such dangers, and defendant knew or could have known thereof, were for the jury. p. 139.
9. **MASTER AND SERVANT.—Injuries to Servant.—Verdict.—Answers to Interrogatories.**—Where the complaint for the death of a servant who received his injuries while adjusting a belt on a pulley, alleged that decedent had been temporarily assigned to discharge the duties of another servant who was absent, and that putting the belt in question on the pulley was a part of the duty of such absentee's position, answers to interrogatories showing that decedent was not specially directed to put the belt on, and that defendant's officers did not know at the time that he was attempting so to do, are not in conflict with a verdict for plaintiff. p. 140.
10. **MASTER AND SERVANT.—Injuries to Servant.—Verdict.—Answers to Interrogatories.**—In an action for the death of a servant

whose injuries were received while placing a belt upon a pulley, which work was one of the duties of the employment to which he had been temporarily assigned, answers by the jury to interrogatories showing that the work he was performing was not a part of his regular employment and was more hazardous, and that decedent knew of the worn and defective condition of the belt, and the effect caused by the dressing used upon it, but which did not show that he knew and appreciated the danger of being injured because of the condition of such belt, were not in conflict with a verdict for plaintiff as showing that the dangers were open and obvious and that decedent in the exercise of ordinary care must have known of them. p. 140.

11. **MASTER AND SERVANT.—*Injuries to Servant.—Verdict.—Answers to Interrogatories.***—In an action for the death of a servant whose injuries were sustained while placing a belt on a pulley, which was a duty connected with work to which he had been temporarily assigned, answers to interrogatories showing that decedent attempted to place the belt while the machinery was in motion will not overcome the general verdict for plaintiff, notwithstanding it was further shown by the answers that defendant had a system of signals and a device for stopping the machinery in such emergencies, where other answers showed that decedent did not know that such device could be so used, that it had not theretofore been used, that it was not the speed of the pulley that caused the injury, that it was the custom to place the belt while the machinery was in operation, and that decedent had never been instructed to use the system of signals or the device for stopping the machinery. p. 141.
12. **TRIAL.—*Verdict.—Answers to Interrogatories.***—Contradictory answers to interrogatories nullify each other, and a judgment cannot be based upon answers that are not inconsistent with the general verdict. p. 142.
13. **MASTER AND SERVANT.—*Injuries to Servant.—Method of Work.***—In an action for the death of a servant, whose injuries were sustained while placing a belt on a pulley, a showing that for more than a year previous to the accident it had not been customary to stop the machinery to put such belt on the pulley is sufficient to establish that such method had the sanction and approval of the master. p. 142.
14. **MASTER AND SERVANT.—*Injuries to Servant.—Method of Work.***—A master who calls upon an inexperienced servant to discharge hazardous duties not previously required of him, and fails to instruct the servant as to the manner of doing the work, cannot, in case of injury to the servant, complain of the method employed by the servant in attempting to perform the work, where he followed the plan and used the means employed by his superi-

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ors with the knowledge of the master; hence where a servant, injured in the performance of work to which he had been temporarily assigned, had knowledge of a system of signals, but was not instructed to use them, and it was long the custom known to the master to do the work he was attempting without using same, the fact of such servant's knowledge does not of itself bring the case within the rule applicable where a servant voluntarily chooses the more dangerous of two ways that are open to him, but such knowledge was proper to be considered on the question of contributory negligence. p. 143.

15. **MASTER AND SERVANT.—Injuries to Servant.—Verdict,—Answers to Interrogatories.—Complaint.**—Every presumption is indulged in favor of the general verdict, and for the purpose of reconciling answers to interrogatories with it, the court on appeal may consider whatever might have been admitted under the issues; hence where the complaint averred that decedent was injured in about fifteen minutes after being temporarily assigned to discharge the duties of another employe, answers by the jury showing that decedent had discharged the duties of such other employe for four days will not be controlling, since evidence was admissible to show that decedent pursued his regular work except at intervals when called upon to discharge a duty of such other employe. p. 143.

16. **TRIAL.—Instructions.—Burden of Proof.**—Instructions that plaintiff is required to prove all the material allegations of his complaint by a fair preponderance of the evidence, that it is not meant that he is required to prove every allegation, but that he must so prove enough of the allegations to make out a case against the defendant, were not erroneous in what they stated, but were incomplete. p. 144.

17. **APPEAL.—Instructions.—Necessity for Request.**—Objections on the ground of the incompleteness of instructions are waived, where appellant failed to request fuller instructions. p. 145.

18. **TRIAL.—Proof.—Allegations of Complaint.**—Immaterial allegations in a complaint need not be proven to warrant a recovery, and literal proof of the material allegations is not essential, but it will suffice if the substance of the issue tendered has been proven by a fair preponderance of the evidence. p. 145.

19. **APPEAL.—Review.—Harmless Error.—Instructions.**—In an action for the death of a servant, the giving of instructions that plaintiff need not prove every allegation in his complaint, but that it was sufficient if he proved some allegation of negligence, is harmless, where it appears from the jury's answers to interrogatories that the verdict for plaintiff was based on the defendant's negligence in furnishing a defective belt which decedent was attempting to place on a pulley, and other instructions were given

relative to the condition of the belt, and informing that there could be no recovery unless decedent was free from utory negligence. p. 145.

20. APPEAL.—*Review.—Harmless Error.—Instructions.*—resulted from the giving or refusing of instructions, given, taken as a whole, state the law correctly. p. 1

From Lake Superior Court; *Virgil S. Reiter*, J

Action by Charles C. Smith, administrator of of Frank Shearer, deceased, against the National F ing Company. From a judgment for plaintiff, t ant appeals. *Affirmed.*

William J. Whinery, for appellant.

Lynn, Baumer & House, Peter Crumpacker and Crumpacker, for appellee.

FELT, J.—Appellee brought this action to recover for injuries, resulting in the death of the decedent Shearer, while in the employ of appellant. Trial resulted in a verdict for appellee in the sum of \$4 which judgment was rendered.

Appellant's assignment of errors challenges the of the facts alleged in each paragraph of appellee's complaint to state a cause of action. The first after the formal averments, charges in substance that appellant owned and operated a plant for the manufacture of tile, brick, tile-roofing and other like products; that six months prior to his injury, Shearer was employed by appellant as a carpenter to work in said plant and was exclusively up to the time of his injury; that during that time, appellant employed in said plant one J. as master mechanic, who had charge of all the shafting, pulleys, belts, tools and appliances in the plant and whose duty it was to keep the same in proper repair and to see to the oiling and running thereof; that on March 23, 1907, Pierce was temporarily called away from the plant, and decedent was taken away from his regular work by the order and direction of appellant, through

and vice principal, one Ben Butler, and temporarily directed to do a part of the work of Pierce during his absence; that Butler had charge of the running and operation of said plant and control of the men employed therein, including decedent; that he had power and authority to direct decedent to do temporarily the work of Pierce; that at the time of decedent's injury, and for many months prior thereto, appellant maintained a certain main horizontal power shaft in its plant which was elevated about ten feet above the floor thereof; that on that shaft were many pulleys from which belts ran to other pulleys and operated the various machines in the plant; that none of the belts or machines could be operated separately, but it was necessary during all of said time to stop the whole machinery in the plant in order to stop any portion thereof, all of which was well known to appellant; that appellant, up to and at the time of decedent's injury, carelessly and negligently used, for the purpose of propelling the machinery, an old, wornout and decayed belt which was dangerous to those whose duties brought them in contact with it, and was unsafe for the proper and safe operation of appellant's machinery; that owing to its condition, the belt frequently came off the pulley over which it ran, and on many occasions prior to the time when decedent was injured, it was necessary for appellant to readjust the wornout belt upon the pulleys; that on account of its worn, thin and soft condition and long continued use it would give and stretch, and in order to make it stick to the pulleys over which it ran and which it operated, and in order to make it perform the work it was intended to perform, appellant had for many months prior to decedent's injury carelessly and negligently used upon the belt a certain belt dressing called "stickum," which was a sticky substance and which was used for the purpose of keeping the plies of the belt together, and in making it adhere to and move the pulleys and prevent the belt from slipping

upon the pulleys; that said "stickum" when used upon the belt in its defective condition made it liable to fold and double on itself when it came off the pulleys and to adhere to itself and adhere to the main shaft around which it was placed, and made it likely to stick to and enfold anything it came in contact with when it was off of its proper place on the pulleys; that by reason of the condition of the belt and the use of the "stickum" thereon, it was highly dangerous to the employes of appellant, working about it or near the shafting, all of which was at all times well known to the appellant, and which was neither known to nor appreciated by the decedent; that decedent was unlearned and unskilled in the duties of Pierce's position, as alleged, to which he was so assigned on the occasion of his injury; that he did not know, realize or appreciate the danger of working in and about the belt, or in putting the belt on the pulley when it came off; that he did not know or realize the condition of the belt, nor did he know or realize that the "stickum" was liable to cause the belt to fold on itself and to wrap about the shafting and about anything in close proximity thereto; that the decedent had not worked about said belt and machinery for more than fifteen minutes, at the time of his injury and was wholly unacquainted with the condition of the belt and of the dangers therefrom, and had had no experience whatever in readjusting such belts in the condition which such belt was in at the time, nor any experience or knowledge in the use of "stickum" on such belts; that the appellant knew, or ought to have known, during all of said time, that it was unsafe and highly dangerous to use the belt and that decedent was wholly ignorant of, and did not appreciate the dangers; that appellant negligently failed and refused to tell decedent, or in any manner notify or warn him of the danger or of the condition of the belt, or of its being likely to fold upon itself and upon the shaft and wrap about the same and about any person or thing coming in contact with it, when it was off of the pulley;

that appellant negligently failed and refused at all times to provide any appliance, instrument, tool or machinery with which to adjust the belt from the floor and place the same upon the upper pulley when it came off of the same; that it had always been the custom and practice at and before the time the decedent was injured, to adjust the belt by placing a ladder, which appellant furnished for that purpose, against an upright post near to and within three feet of such upper shafting and pulley whereby the person adjusting the belt could climb to the top of the ladder and, with one arm around the post, reach out with the other, take hold of the belt and put it upon the upper pulley, while others put it upon the pulley below; that the upper pulley is about nine feet higher than the lower one; that on March 23, 1907, the belt came off the pulleys over which it ran and, in obedience to the orders of appellant's vice principal, Butler, and while temporarily in the performance of the duties of Pierce, decedent attempted to put the belt upon the upper pulley; that while decedent was upon the ladder in the manner aforesaid and attempting to adjust the belt and put the same upon the upper pulley, as aforesaid, in obedience to the orders and in compliance with his duty, his hand and arm were caught by the belt by reason of the belt doubling upon itself and adhering to the upper power shaft and pulley, and he was thereby and by reason thereof thrown into said belt and pulley and twisted around the pulley and shaft and could not extricate himself therefrom; that the shaft was at the time revolving at the rate of about three hundred revolutions per minute, which was its usual rate of speed when the machinery was in operation; that by reason thereof decedent was whirled so rapidly around the shaft and against the ceiling of the building that his arm was pulled off at the shoulder and he was so bruised, lacerated and injured thereby that he died within a few minutes thereafter from his injuries; that decedent's injuries and death were due solely and entirely to the negligent acts of

appellant; that neither decedent nor appellee was guilty of any negligence whatever that contributed in any manner to decedent's injuries or death.

The second paragraph contains in substance all of the allegations of the first paragraph with the additional averments that on the afternoon before the injury and death of decedent, one Owens, who was appellant's general manager, and vice principal, made certain repairs on the belt which caused decedent's injury; that he then pronounced the belt safe and sufficient until appellant had reasonable time to secure a new belt, which he said would be done in a few days; that decedent heard the assurance of safety by Owens, relied thereon, believed it to be true and that the belt was safe and sufficient; that he did not see any defects in the belt thereafter and could not, by the exercise of reasonable diligence and care upon his part, have known and discovered that the belt, notwithstanding the repairs and statements of the manager, was still old, wornout, unsafe, sticky and dangerous; that notwithstanding the repairs and statements, the belt was defective and practically and substantially in the same condition that it was in before the repairs were made.

The answers to the 387 interrogatories the jury was required to answer, show, in substance, that the decedent had been in appellant's employment about five years prior to March 23, 1907, as a carpenter and as helper to the blacksmith and machinists; that he was 42 years of age, possessed of all his faculties and of ordinary intelligence; that it was the duty of one Pierce to oil the machinery and look after the belts and belting and general running of the machinery; that it was not a part of decedent's duty to take Pierce's place whenever he was absent; that decedent had performed Pierce's work for four days continuously immediately preceding March 23, 1907, and for one day about two years previously; that he was not working in the line of his employment at the time he was injured; that he was injured at about 6:30 or 7 a. m. on March 23, 1907, while temporarily

performing the duties of Pierce, appellant's regular oiler; that the belt in question was a badly worn rubber belt about six inches wide and the pulley over which it ran revolved at the speed of from 200 to 285 revolutions per minute; that it was not a part of Shearer's duty to replace the belt when it came off save when he was taking Pierce's place; that he had replaced the belt on the pulley three or four times during the week prior to the day of his injury; that the belt was not in the same state of repairs during all of that time but a piece of it had been cut off on March 23, 1907; that in the two years prior to March 23, 1907, the belt had become loose and badly worn and decedent had several opportunities to observe the condition of the belt during that time; that a person of ordinary intelligence who had frequently put a belt on a pulley running 280 revolutions a minute and had had no accident, would not consider it very dangerous to place the belt on the pulley while running at that speed; that there was a system of signals in operation in appellant's plant to regulate the running of its engine and machinery; that the signals were known to decedent; that it was a part of Shearer's duties to assist in repairing machines and machinery, belts and belting, in appellant's plant, on and prior to March 23, 1907, and he had assisted in making such repairs; that had decedent signalled appellant's engineer to stop the machinery it would have been the latter's duty to have done so and it would have taken only about 30 seconds to have stopped or slackened the speed of the pulley and it would have taken about 15 seconds to have given such signal; that there was a clutch provided whereby the line shaft and pulley in question might be stopped without stopping the other machinery but such clutch could not be used when there was a load on the machinery; that decedent did not know the clutch could be so used and it was not in fact so used; that it would have been safer for decedent to have done the work in question had he caused the line shaft and pulley to be stopped or the

speed thereof slackened; that the injury to Shearer was caused by the belt folding around his arm on the line shaft; that Shearer was not directed by any officer, superintendent, foreman or agent of appellant to replace the belt on the occasion of his injury and they did not know of his intention to do so; that the belt in question was old and badly worn and decedent knew of its condition; that between March 19, 1907, and March 23, 1907, decedent himself repaired the belt by cutting off a loose piece of the same; that appellant, through its agents, was better informed as to the condition of the belt in question than was Shearer; that the agents had more experience with belts than he; that it was Shearer's duty while taking Pierce's place to replace belts and at the time of his injury he was attempting to replace the belt at the request of one of appellant's workmen; that Shearer did not realize the work he was attempting to do was dangerous, as he had performed the same before and had seen others do so without injury; that he knew of the worn and pliable condition of the belt prior to the time of his injury; that the belt had wrapped around the line shaft once before during the week preceding his injury and he had unwrapped it on that occasion but he had never been caught by the belt nor had he seen any one so caught, and he did not know of the great danger of being caught; that the danger of the belt wrapping around the shaft was greater when the shaft and pulley were revolving at a rate of 280 revolutions per minute, than when they were revolving slowly but there was no evidence that Shearer knew this; that the fact that the belt was old, worn, limber and sticky caused it to fold and wrap upon itself; that it was not the speed of the shaft and pulley which caused the belt to fold and wrap upon itself, but it was the belt dressing on it; that Shearer himself placed on the belt all the dressing which had been used on it during the four days immediately preceding the occasion of his injury; that the risks, dangers and hazards which decedent encountered at

the time of his injuries did not belong to his regular employment and in his regular employment, decedent had nothing to do with the belt; that it was the custom and practice in appellant's plant to put the belt on while the machinery was running at its usual rate of speed; that the regular oiler for more than a year prior to decedent's injury had not caused the machinery to be stopped merely for the purpose of putting on a belt; that such custom and practice was generally known in appellant's plant and was known to decedent; that Pierce, the regular oiler, knew of the dangerous condition of the belt and had known it for some months prior to decedent's injury; that it required a skilled man to understand and appreciate the danger incident to the putting on of the belt, and Shearer was not so skilled; that he was a reasonably prudent and careful man; that he had never induced appellant or its agents having control over him to believe or think that he was skilled in the matter of handling and putting on belts; that the catching and wrapping of the belt around Shearer's arm was the direct cause of his injuries and he died by reason of such injuries; that he did not realize the dangers from the belt before it commenced to wrap about his arm and he could not have extricated his arm after the belt had wrapped about it; that had the belt been in a reasonably good condition at the time in question, it could have been put on the pulley while the same was moving in the usual manner without great danger to the person putting it on and a reasonably careful and prudent person, if skilled in putting on belts, would have undertaken to put on such a belt while the machinery was going at its usual rate of speed; that appellant at all times had full knowledge of the condition of the belt before the time of Shearer's injuries; that on the afternoon before decedent's injuries, appellant's superintendent, Owens, after notice from Shearer as to the condition of the belt, personally supervised the repair of the same and by his action and words assured Shearer that the belt was then

in proper condition and safe to use and decedent so believed; that the only thing the evidence shows Owens to have said in decedent's presence at that time concerning the safety of the belt was: "All right, go ahead"; that neither appellant, nor any of its agents, had ever instructed Shearer to use the signal system or in any other way to stop or slacken the speed of the engine for the purpose of putting on the belt; that the belt was always adjusted without using the clutch or in any other manner stopping or slacking the speed of the machinery; that there is no evidence to show what caused the belt to wrap on the other occasion prior to decedent's injury and Shearer was not present at the time it wrapped but his attention was called to it after it had so wrapped.

The questions presented by this appeal make it important to ascertain the theory of the complaint. This must be determined from a consideration of its leading aver-

1. ments and the general scope and tenor of the pleading. The theory most apparent and clearly outlined by such consideration will be adopted, rather than any possible theory that may be to some extent indicated by a consideration of detached parts and fragmentary statements, or the conclusions of the pleader. *State, ex rel. v. Scott* (1908), 171 Ind. 349, 354, 86 N. E. 409; *Vandalia R. Co. v. State, ex rel.* (1906), 166 Ind. 219, 229, 76 N. E. 980, 117 Am. St. 370. When a pleading is framed
2. upon a definite theory that may be ascertained by such consideration of its averments, it must be good upon that theory or it will be held insufficient.

Both paragraphs of complaint contain many averments, some of which might be used to support different theories, but tested by the foregoing rule, the leading averments and general tenor of the first paragraph of the complaint, show the theory to be that of a temporary change of employment involving hazards not covered by decedent's contract of hiring, which dangers in the exercise of ordinary care

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for his own safety he could not ascertain, and of which the master, in legal contemplation, had knowledge, but of which it failed to warn the decedent. This theory is apparent from the pleading itself, and was recognized by the trial court, which instructed the jury accordingly. The gist of the charge is that there were dangers in putting on the belt, due to its worn and defective condition and the effect of "stickum" used upon it that were known to the master and unknown to decedent and could not be known to one of his skill and ability in the exercise of ordinary care for his own safety; that the master failed to warn him thereof and his injury and death resulted from such peculiar and hidden dangers of which he had no knowledge or warning. It is also charged that decedent attempted to put the belt on the pulley in the same way and by the same means employed in the factory for more than a year prior to the accident, by the regular "oiler" or person employed for that purpose; that decedent was unlearned and unskilled in the duties of the position to which he was temporarily assigned; that he neither knew, realized nor appreciated the dangers incident to putting the belt on the pulley, that he neither knew nor appreciated the effect of said "stickum" upon the belt and its liability to cause the same to fold and wrap about the pulley and to adhere to anything with which it came in contact. Before a master exposes an inexperienced

3. servant to dangers that are not apparent to one of his skill and experience, he is required to warn him thereof and to give him such instructions as will enable him, by the exercise of ordinary care, to avoid injury.

Republic Iron, etc., Co. v. Ohler (1903), 161 Ind. 393, 402, 68 N. E. 901. The servant's implied assumption of

4. risk covered by his contract of hiring, extends to all the risks ordinarily incident to such employment, but where the master temporarily transfers him from such work and requires of him services involving different duties and hazards not within the scope of his employment, the servant

by entering upon the discharge of such new and different duties does not assume the hazards incident thereto, except such as he may ascertain by the exercise of ordinary care for his own safety. The master is required to give such inexperienced servant both instruction and warning relative to the duties and dangers of his changed employment, and failure to do so renders him liable for an injury resulting from such failure where the servant has not negligently contributed to his own injury. *Newcastle Bridge Co. v. Doty* (1907), 168 Ind. 259, 264, 79 N. E. 485.

But it is asserted that the pleading shows that decedent assumed the risk and was himself negligent in attempting to do the work in the manner charged; that the hazard was open and apparent and the decedent's opportunity for knowing the danger was as good as that of the master and could be ascertained by any intelligent person in the exercise of ordinary care. It has been held that it is only

5. where the person injured, knowing and appreciating the danger, voluntarily encounters it, that such knowledge is a defense and that notwithstanding the rule of assumed risk, as a matter of pleading it is only necessary to allege that the servant did not know of the alleged defect or danger in order to exclude both actual and implied knowledge on his part. As a matter of proof to sustain such averment, however, it is necessary to show not only a want of such knowledge, but that it could not have been acquired by the exercise of ordinary care. *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 300, 53 N. E. 235; *Standard Oil Co. v. Fordeck* (1904), 34 Ind. App. 181, 187, 71 N. E. 163. It has also been held that

6. one does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger without appreciating it; that knowledge of facts indicating danger does not necessarily show that the risks were understood and appreciated, and likewise that knowledge of danger itself does not neces-

sarily show negligence on the part of the one who takes the risk. *Avery v. Nordyke & Marmon Co.* (1905), 34 Ind. App. 541, 552, 553, 70 N. E. 888; *Wortman v. Minich* (1901), 28 Ind. App. 31, 33, 62 N. E. 85; *City of Fort Wayne v. Christie* (1901), 156 Ind. 172, 176, 59 N. E. 385; *Wright v. Indianapolis, etc., R. Co.* (1903), 160 Ind. 583, 590, 66 N. E. 454; *Perry, etc., Stone Co. v. Bennett* (1910), 46 Ind. App. 582, 586, 93 N. E. 238; *Holcomb v. Norman* (1911), 47 Ind. App. 87, 91 N. E. 625. The facts pleaded which

tend to show the character of the defects and de-

7. cedent's opportunity for knowing and appreciating the danger of the work to which he was temporarily assigned, are not sufficient to overcome or nullify the averments showing the peculiar and hidden dangers incident to the condition of the belt and the work of putting it on the pulley, decedent's ignorance of such dangers and his want of skill and experience in relation thereto, coupled with appellant's alleged knowledge thereof and failure to warn decedent when he was so transferred from his regular work and assigned to other duties involving dangers not incident to his regular employment. The complaint does not therefore show affirmatively that he assumed the risk or that his negligence contributed to his injury. Whether the

8. risks incident to the new duties to which the decedent was temporarily assigned as alleged were visible and could have been ascertained by him in the exercise of ordinary care, or were of a character requiring knowledge and experience to detect, which he did not possess, and whether he was ignorant of such dangers and appellant knew thereof or could have known by the exercise of the care enjoined upon it by the law, are all questions of fact under the issues in this case to be determined by the jury from the evidence. *City of Fort Wayne v. Christie, supra*, 176; *Chicago, etc., R. Co. v. Barker* (1907), 40 Ind. App. 256, 262, 81 N. E. 1179; *Perry, etc., Stone Co. v. Bennett, supra*, 586. The second paragraph of complaint contains all

the averments of the first, and additional allegations of repairs by the master on the day before the accident and assurance to the decedent that the belt was safe and sufficient until a new one could be provided, which was to be done in a few days. Both paragraphs were sufficient to withstand the demurrer and the court did not err in overruling the same.

Error is also assigned in the overruling of appellant's motion for judgment on the answers to the interrogatories notwithstanding the general verdict. One ground of 9. contention is based upon the finding that the decedent was not directed by appellant or any of its superior officers or agents to put the belt on the pulley. The complaint avers, however, that he was called upon to discharge the duties of Pierce while the latter was temporarily absent, and that putting the belt in question on the pulley was a part of the duties of that position. The special finding simply shows that he was not specially directed to put the belt on, at or before the time of his injury, and that the superior officers of appellant did not know at the time he was undertaking to do so. The answers are not contradictory of the general verdict, for after assigning him to the duties of Pierce's position, as alleged, it was immaterial whether he was specially directed to do any particular act so long as he was acting in the line of the particular employment to which he was so assigned.

It is further contended that the answers which show that decedent had discharged the duties of Pierce for four days immediately prior to the accident and for one day 10. about two years prior thereto, that he had been called upon to put the belt on the pulley and once to unwrap it after it had wound around the pulley, that he knew the belt was old and worn and liable to wrap around the pulley, that decedent himself had placed the "stickum" on the belt while discharging the duties of Pierce, that it was the dressing that caused the belt so to

wrap and to fold upon itself, show that the decedent, in the exercise of ordinary care, must have known of the dangers of his work; that his position enabled him to know all that the master could know by ordinary care and inspection; that the dangers were open and obvious to a person of ordinary intelligence and were knowingly encountered by the decedent. The answers show that he knew there was some danger, but they do not show that he knew and appreciated the danger of being injured because of the worn and defective belt and its condition caused by the dressing used upon it. The answers also show the work he was doing when injured was not a part of his regular work and was more hazardous than his regular employment. It was possible for him to know the belt was worn and defective, also to place the dressing upon it himself and to put the belt upon the pulley without knowing the peculiar danger incident to the probability of the belt's wrapping and enfolding upon itself and adhering to anything with which it came in contact, to such an extent as to produce the injury as alleged in the complaint. While it is shown in the answers that he unwrapped it once from around the pulley and knew it was likely to wrap, it is also expressly found that Shearer did not know the dangers attending the putting on of the belt and did not at any time know the belt was likely to catch and wrap around his arm, and that it is not shown what caused the belt to wrap around the spindle on former occasions and that Shearer was not present when it did so wrap but only knew of it after it was in that condition.

The findings in regard to the system of signals and the clutch are nullified by the other findings which show that the clutch could not be used when there was a load

11. on the machinery, that decedent did not know the clutch could be so used and it had not in fact been so used when the belt was being placed on the pulley; that it was not the speed of the shaft and pulley that caused

the belt to fold and wrap upon itself, but the belt dressing; that it was the custom and practice in appellant's plant to put the belt on while the machinery was running at its usual rate of speed and it was so running when decedent was injured, that the regular "oiler" for more than a year prior to the accident had not stopped the machinery for the purpose of putting on the belt and such custom was generally known in appellant's factory; that neither appellant nor any of its agents had ever instructed Shearer to use the signal system or to stop or slacken the speed of the machinery while putting on the belt in question and the belt was always adjusted without using the clutch or in any other manner stopping or slackening the speed of the machinery. The findings that show that the speed of the pulley and shaft did not contribute to or cause the injury complained of, and that the injury was caused by the condition of the belt produced by the dressing used upon it, instead of contradicting the general verdict, supported it and are consistent with the theory of the complaint. It is

well established that contradictory answers nullify

12. each other and that answers which are consistent with and in support of the general verdict give no basis for judgment upon the answers to the interrogatories.

It is further contended that the answers show that appellant had provided two or more ways of doing the work of putting on the belt and that decedent knowingly and

13. voluntarily chose a dangerous way when a safer way was provided by the master. The answers fail to show that the master had provided a safer way or more than one way of putting on the belt, but tend to show additional precautions for safety that might have been employed. The answers do show that it would have been safer to have stopped the machinery and that Shearer knew the use of the signals, but they fail to show that either the clutch or the signals were provided by the master to be used when putting on the belt in question, but on the contrary it is

found that decedent followed the plan of the superior servants whose duties he was attempting to discharge, and who were better informed as to the condition of the belt than he; that the method employed by decedent had been used continuously in the factory for more than a year prior to the accident. Such continued and habitual use of this plan for such length of time by the persons charged with the responsibility of the work, will be held to have been with both the knowledge and approval of the master.

14. Furthermore, the master who calls upon a servant to discharge hazardous duties not previously required of him, and fails to give any instructions as to the manner of doing such work is not in a position to complain of the way in which the work was attempted to be done where such inexperienced servant follows the plan and uses the same means employed by his superiors, with the knowledge of the master. Shearer's knowledge of the signals and their possible use, on the facts of this case, affords no ground for the application of the rule invoked where two ways are open to the servant and he voluntarily chooses the more dangerous way, but such knowledge was proper to be considered with the other pertinent evidence in determining whether he was guilty of negligence contributing to his injury and death.

There is no irreconcilable conflict between the averment of the complaint that Shearer was injured in about fifteen minutes after his transfer of employment and the

15. finding that he had discharged Pierce's duties for four days. Every presumption is indulged in favor of the general verdict and we are to consider any evidence admissible under the issues that will reconcile the answers with such verdict. It appears that Shearer was called by one of appellant's workmen a few minutes before his injury and that he immediately proceeded to adjust the belt in response to such call. Evidence was admissible to show that Shearer pursued his regular work except when called

upon to discharge duties belonging to Pierce's position and that he was doing his regular work when called to adjust the belt on the occasion of his injury. At all events, it appears without contradiction that he was injured while attempting to do work outside his usual employment and without considering any facts other than those shown by the special findings, the alleged inconsistency is wholly insufficient to overthrow the general verdict. The question whether Shearer knew and appreciated the conditions and dangers incident to putting on the belt as alleged, was one to be determined by the jury, and the answers are not in irreconcilable conflict with the finding upon that question made by the general verdict, but on the contrary many of the answers are strongly corroborative of the general verdict and we therefore conclude that the court did not err in overruling the motion for judgment on the answers to the interrogatories, notwithstanding the general verdict. *Davis Coal Co. v. Pollard* (1902), 158 Ind. 607, 62 N. E. 492, 92 Am. St. 319.

The appellant has also assigned error in overruling its motion for a new trial. What we have said disposes of many of the questions presented relative to instructions given and refused. On the theory of the complaint, many instructions asked by appellant and refused were not applicable to the issues tendered and tried. Most of the other instructions tendered and refused related to questions covered fully by instructions given. Complaint is specially

made of instructions Nos. 26, 27, which are as follows:

26. "The plaintiff is required to prove all the material allegations of his complaint by a fair preponderance of the evidence. By this it is not meant that he is required to prove every allegation of his complaint, as it is alleged, but that before he can recover he must prove enough of said allegations by a fair preponderance of the evidence as are necessary to make out a case

against the defendant.” 27. “The plaintiff is not required to prove each allegation in his complaint charging negligence against the defendant, but before he can recover he must prove, by a preponderance of the evidence, some material allegation of negligence as alleged in his complaint, and that such allegation was the proximate cause of the injury and death of his decedent, as therein alleged.” The instructions are not erroneous in what they state but are incomplete. The appellant did not tender any in-

17. struction to advise the jury more fully on the points covered by these instructions and has therefore waived any objection on the ground of their incompleteness.

Instruction No. 26 when fairly interpreted told the 18. jury that to recover, the plaintiff must prove all the material allegations of the complaint by a fair preponderance of the evidence, but need not prove every allegation as alleged. In other words, literal proof is not required but the substance of the issue when so proven will suffice. This proposition is too well established to require the citation of authority to sustain it. Furthermore, immaterial allegations, though in the complaint, need not be proven to warrant a recovery. That the instruction did not more definitely state the material allegations necessary to a recovery, does not show it to be erroneous, in the absence of a request for a more complete instruction upon the subject. The same is true of instruction No. 27.

By instruction No. 10, the jury was told that the plaintiff could not recover though it was proven that he was caught and thrown as alleged, unless it was also proven by 19. a fair preponderance of the evidence that the real cause of the entanglement of decedent's arm in the belt was due solely to the negligence of appellant as alleged and that decedent in no way contributed thereto. By instruction No. 13, the jury was told that if it found from the evidence that each and all of the allegations of the

complaint were true regarding the condition of the belt, yet if they further found from the evidence that plaintiff's decedent at and before the time of the injury knew, or by the exercise of ordinary care on his part and the use of his senses could have learned, at or before the time of the injury, that the belt was old, worn-out, decayed, soft, pliable, insufficient and dangerous, then the decedent must be held to have assumed the risk arising out of the condition of said belt and there can be no recovery. By instruction No. 20, the jury was told that if the decedent knew or, by the exercise of care as aforesaid, could have known that the dressing used upon the belt was a sticky substance and liable to make the belt stick and adhere to the pulley and line shaft, and to other objects, he must be held to have assumed the risk of the use of the belt dressing and there can be no recovery. The jury, by its answers to the interrogatories, expressly found that the injury was caused by the condition of the belt and the dressing used upon it, also that decedent did not know and could not ascertain the dangers but the same were known to appellant's more skilled employes, and decedent was not warned thereof. This shows clearly the negligence upon which the jury based its verdict, and that failure to specify more fully the material allegations of the complaint could not have harmed appellant, since the instructions relative to the condition of the belt and the dressing used upon it were full, specific and as favorable to appellant as the law warrants. By instruction No. 40, the jury was informed as to the theory of the complaint, as already indicated, and by numerous other instructions every phase of the case, within the issues, relating either to liability or defense, was fully and fairly covered. The instructions, taken as a whole, state

20. the law correctly and we are convinced that appellant was not harmed by the instructions given or by the failure to give those refused.

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The other questions presented are in effect answered by what we have already said. The motion for a new trial was properly overruled. Judgment affirmed.

Ibach, J., not participating.

NOTE.—Reported in 99 N. E. 829. As to assumption of risk and contributory negligence in law of master and servant, see 97 Am. St. 884; 96 Am. St. 289. As to the general question of the master's duty to warn or instruct servant, see 44 L. R. A. 33. As to the master's duty to protect or warn against dangers not reasonably to be apprehended, see 21 L. R. A. (N. S.) 89; 39 L. Ed. U. S. 465. As to the servant's assumption of risk of danger imperfectly appreciated, see 4 L. R. A. (N. S.) 990. As to the servant's assumption of obvious risks of hazardous employment, see 1 L. R. A. (N. S.) 272. See, also, under (1) 31 Cyc. 84; (2) 31 Cyc. 116; (3) 26 Cyc. 1173; (4) 26 Cyc. 1172; (5) 26 Cyc. 1393, 1415; (6) 26 Cyc. 1201; (8) 26 Cyc. 1478; (9) 26 Cyc. 1513; (12) 38 Cyc. 1926; (13) 26 Cyc. 1450; (14) 26 Cyc. 1243, 1250; (15) 38 Cyc. 1930; (16) 38 Cyc. 1748, 1750; (17) 38 Cyc. 1693; (18) 31 Cyc. 675, 680; (19) 38 Cyc. 1815; (20) 38 Cyc. 1809, 1816.

OHIO FARMERS INSURANCE COMPANY v. GLAZE.

[No. 7,967. Filed May 8, 1913. Rehearing denied October 7, 1913.
Transfer denied December 10, 1913.]

1. **INSURANCE.** — *Fire Insurance.* — *Proof of Loss.* — *Sufficiency.* —

Where insured in a fire policy covering a mercantile stock furnished all the proof of loss that he was able to furnish, because of the loss of the original bills rendered for the goods, and supplied such loss in accordance with the requirements of the company to the extent of his ability by procuring statements from numerous merchants from whom he made purchases and furnishing the company copies of the same, and furnishing an invoice of the goods, which the company's adjuster accepted without requiring it to be verified, there was a substantial compliance with the provision of the policy that the insured must furnish a verified statement showing the cash value of each item of property destroyed and the amount of loss thereon, and the company was liable, notwithstanding a waiver agreement made subsequent to the loss and stipulating that any action taken by the company in investigating the amount of the loss could not operate as a waiver of any of the conditions of the policy. pp. 152, 154.

2. **INSURANCE.** — *Contracts.* — *Construction.* — Provisions in an insur-

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ance policy designed for the sole benefit of the company, to be most strongly construed in favor of the insured. p. 152.

3. **INSURANCE.—Waiver of Conditions of Contract.—Agent.**—A stipulation in a fire policy that no agent shall waive any condition unless by written endorsement refers only to conditions essential to the obligatory effect of the contract between the parties in the first instance, and to its continuing force and obligation until loss occurs, does not refer to stipulations as to the manner of making good a loss, which an agent may waive without endorsement.
4. **INSURANCE.—Stipulation as to Proof of Loss.**—Where an insurance company will be deemed to have waived the proof required by the policy, where its agent, duly authorized with reference to the subject, accepts proofs different from those required by the policy, notwithstanding the policy prohibits an agent from waiving any of its conditions. p. 153.

From Harrison Circuit Court; *William Ridley*,

Action by Andrew J. Glaze against the Ohio Farmers Insurance Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Major W. Funk, George K. Gwartney and Lee J. Glaze, appellants.

William T. Zenor, George B. McIntyre and John W. Corbin, for appellee.

SHEA, J.—This was an action by appellee against appellant to recover upon a fire insurance policy executed by the latter to him. The amended complaint was in three paragraphs. Appellant's demurrer to each paragraph was overruled. Answer was filed in general denial. The facts were tried by jury; finding and judgment for appellee. Appellant's motion for peremptory instructions to find in its favor was overruled. The objections argued and not waived by appellant, are the overruling of its motion for peremptory instructions, and the overruling of its motion for a new trial.

The reasons urged in support of the motion for a new trial are, that the verdict is not sustained by sufficient evidence, and is contrary to law. Appellant's counsel

brief expressly state that: "Of the several errors assigned for the reversal of this case, they all revert back to the fact of the insufficiency of the evidence to sustain the verdict." The court will, therefore, consider this proposition first.

The evidence shows that the policy sued on was for the sum of \$1,100; \$600 on appellee's two-story frame metal-roof storeroom, and \$500 on his stock of groceries, patent medicines, hardware and dry goods contained in the building; that it was executed by appellant's agent on December 21, 1908, and appellee paid the premium due, receiving from the agent a receipt for same. The fire occurred about midnight or one o'clock on the night of December 22-23. About December 20, 1908, appellee commenced to take an inventory of the stock of goods contained in his store, and had partially completed it on December 22. This consisted of counting some of the goods, weighing those that sold by weight and making a list of same, putting down the prices paid by appellee, which he took from the bills rendered at the time he purchased the goods. The fire was discovered by appellee's daughter, who occupied a room in his dwelling house which was a separate building situated about two feet from the storeroom. The storeroom was heated by a large cast iron stove placed in the center of the lower floor, and connected by pipes with a chimney. The pipes were in good condition, and the stove had been in use for about a year. The building was also in good condition and repair, and had been recently painted. All appellee was able to save was a telephone box and some books, the store and its contents being completely destroyed. Appellee notified appellant's agent, Gwartney, of the fire the next day. On January 5, 1909, appellant's adjusting agent Chalfant called and made an examination of the loss. He asked appellee if he had a list of the property lost, and appellee told him as well as he could about the condition of the property. The agent then asked if he had the bills, to which appellee replied that he had not, everything had

been destroyed but the books, and they were not in the books. Appellee told him of the invoice and offered to get it, but the adjusting agent said: "Never mind, we generally require parties under such circumstances to get duplicate bills from the merchants they buy from for the last year past." Appellee thereupon furnished him the names of the merchants with whom he had been trading and the adjuster made a note of them, saying he would see them himself. Appellee informed the adjuster that he had paid cash for the goods, and they never had any bills. The adjusting agent then requested appellee to sign a nonwaiver agreement, which appellee hesitated to do until informed that it would not interfere with his policy in any way; that the "meaning of it was it would give them and me unlimited time in making investigation as to the bills"; that appellee would hear from him in eight or ten days. Appellee's understanding was that the adjuster was to see the parties first, but failing to hear from him, appellee called on them himself, and got statements from all of them. These statements were introduced in evidence, and many of them were to the effect that the merchant was unable to furnish information as to the exact amount of the purchases, the goods having been paid for in cash, and no record kept except a cash book entry. Copies of the statements obtained were made and forwarded to appellant's agent Gwartney. About three weeks later a second adjusting agent came, and appellee was notified to come to Gwartney's office. The adjusting agent made some figures and calculations, and appellee gave him the measurements of the building which the agent estimated as being worth \$1,200. When appellee showed him the invoice of goods, he asked to take it with him, but appellee retained the original and had two copies made, one of which he furnished the adjusting agent. Appellee asked the agent when he would hear from him, or if there was anything further, and he said: "No, not at present"; that appellee would "hear from the company in a short

time". The adjusting agent took the copy of the invoice with him, but did not ask appellee to swear to it. Appellee heard nothing further from the company in regard to his loss. He wrote the company direct at LeRoy, Ohio, several times, asking for information as to what it intended to do, but received no reply. This was about a month or six weeks after he met the adjusting agent at Gwartney's office. Appellee also wrote to Gwartney, and heard from him to the effect that the company still insisted upon fuller and more complete statements than those appellee had forwarded. Appellee insists that he obtained from the merchants with whom he traded all he could get in the way of statements and duplicate bills. There never has been any settlement of the loss or any part of it by the company. The complaint which was filed on November 15, 1909, alleged that the claim was more than eight months past due.

Appellant insists that there has been a failure of compliance with the following requirements of the policy:

"and, within sixty days after the fire, unless such time is extended in writing by this company, (appellee) shall render a statement to this company, signed and sworn to * * * stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the assured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building fixtures, or machinery destroyed or damaged, etc."

The policy contained a nonwaiver clause. It is also shown in evidence that in addition to this clause a nonwaiver agreement was signed on the day the adjuster Chalfant visited the scene of the fire as follows:

“It is hereby mutually stipulated and agreed by and between Andrew J. Glaze, party of the first part, and Ohio Farmers Insurance Company of LeRoy, Ohio, and other Companies signing this agreement, party of the second part, that any action taken by said party of the second part, in investigating the cause of fire or investigation and ascertaining the amount of loss and damage to the property of the party of the first part caused by fire alleged to have occurred on 23d day of December, 1908, shall not waive or invalidate any of the conditions of the policy of the party of the second part, held by the party of the first part and shall not waive or invalidate any rights whatever of either of the parties to this agreement.

The intent of this agreement is to preserve the rights of all parties hereto and provide for an investigation of the fire and the determination of the amount of the loss or damage, in order that the party of the first part may not be delayed unnecessarily in his business and in order that the amount of his claim may be ascertained and determined without regard to the liability of the party of the second part.”

It is the opinion of this court that under the authorities of both this and the Supreme Court there was a substantial compliance with all the provisions of the policy im-

1. posed upon appellee. He furnished all the proof of loss that he was able to furnish, because of loss of the original bills rendered for the goods. He supplied this loss in accordance with the requirements of appellant to the extent of his ability, by having statements made by numerous merchants from whom he made purchases, during the time required by the company, copies of which were furnished appellant. He furnished an invoice of the goods, which was accepted by the adjuster of the company without requiring a verification thereof. It has been held in this State in well-considered cases, where an insurance company, in answer to a suit on a policy of insurance, alleges a failure on the part of the insured to produce bills, a reply that they were destroyed by fire, furnishes a good excuse. *Aurora Fire Ins. Co. v. Johnson* (1874), 46 Ind. 315; *Ger-*

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mania Ins. Co. v. Johnson (1874), 46 Ind. 331; *German Alliance Ins. Co. v. Newbern* (1910), 25 Okla. 489, 106 Pac. 826, 28 L. R. A. (N. S.) 337; *Franklin Ins. Co. v. Culver* (1855), 6 Ind. 137. It must follow therefore, that the law of this State is that where sufficient reason is given for not producing books and papers required by the policy, it meets the requirements of the law.

It has also been repeatedly decided in this State that where provisions in an insurance policy are inserted for the sole benefit of the insurance company, they will be most

2. strongly construed in favor of the insured. *Continental Ins. Co. v. Vanlue* (1890), 126 Ind. 410, 415, 26 N. E. 119, 10 L. R. A. 843; *Behler v. German Mut. Fire Ins. Co.* (1879), 68 Ind. 347, 351; *Milwaukee Mechanics Ins. Co. v. Niewedde* (1894), 12 Ind. App. 145, 39 N. E. 757; *Aetna Ins. Co. v. Strout* (1896), 16 Ind. App. 160, 44 N. E. 934; *Kentucky Mut. Ins. Co. v. Jenks* (1854), 5 Ind. 96; *Indiana Mut. Fire Ins. Co. v. Conner* (1854), 5 Ind.

170. A stipulation in a policy that "no agent has
3. power to waive any condition of this contract unless by written endorsement thereon", refers to conditions essential to make the contract obligatory and binding between the parties in the first instance, and to its continuing force and obligation till loss occurs, but does not refer to stipulations requiring the assured to make proof of loss in a special manner, and such stipulations may be waived by an agent without endorsement. *Indiana Ins. Co. v. Capehart* (1886), 108 Ind. 270, 8 N. E. 285; *Havens v. Home Ins. Co.* (1887), 111 Ind. 90, 12 N. E. 137, 69 Am. Rep. 689; *Commercial, etc., Ins. Co. v. State, ex rel.* (1887), 113 Ind. 331, 335, 15 N. E. 518; *Phoenix Fire Ins. Co. v. Pickel* (1891), 3 Ind. App. 332, 334, 29 N. E. 432.

Although an insurance policy on its face prohibits
4. any agent from waiving any of its conditions where other proofs than those required in the policy are accepted by an agent of the company, duly authorized to

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act with reference to that subject, the company will be deemed to have waived the proof required by the policy. *Indiana Ins. Co. v. Capehart, supra; Germania Fire Ins. Co. v. Pitcher* (1902), 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003. See, also, *American Fire Ins. Co. v. Sisk* (1893), 9 Ind. App. 305, 36 N. E. 659; *Western Assur. Co. v. McCarty* (1897), 18 Ind. App. 449, 48 N. E. 265; *German American Ins. Co. v. Sanders* (1896), 17 Ind. App. 134, 46 N. E. 535; *Aetna Ins. Co. v. Shryer* (1882), 85 Ind. 362; *Indiana Ins. Co. v. Pringle* (1898), 21 Ind. App. 559, 52 N. E. 821.

So it must be held, in this case, we think, in all fairness, that the waiver clause in the policy, as well as the waiver agreement subsequently procured of the insured by

1. the adjuster of the company, cannot be held to require impossible things of a property owner who has paid for his insurance and sustained a loss about which no question is raised in the evidence except as to the amount thereof, and that question being settled adversely to appellant's contention by the jury, this court cannot disturb the verdict. It follows that the judgment is sustained by sufficient evidence and is not contrary to law.

The motion for peremptory instructions was properly overruled. We have also examined the instructions which were given over objections, and those which were refused over objections, and find the law was correctly stated within the issues and the evidence. No error appears in the record which warrants this court in reversing the case. Judgment affirmed.

NOTE.—Reported in 101 N. E. 734. As to waiver of condition in policies requiring waivers to be endorsed in writing, see 107 Am. St. 99. As to the effect of limitations on an agent's authority to waive conditions in an insurance policy, see 2 Ann. Cas. 112, 9 Ann. Cas. 380. See, also, under (1) 19 Cyc. 849, 851; (2) 19 Cyc. 656; (3) 19 Cyc. 860; (4) 19 Cyc. 862.

KIMBERLIN ET AL. v. TEMPLETON ET AL.

[No. 8,040. Filed June 17, 1913. Rehearing denied October 31, 1913.
Transfer denied December 10, 1913.]

1. **VENDOR AND PURCHASER.—Contract for Sale of Real Estate.—Title of Vendee.—Equitable Ownership.**—Where there is a contract for the sale of real estate, the vendor simply holds the title as security for the purchase money, and the vendee becomes the equitable owner thereof so that he secures all the benefits and assumes all the risks of ownership. pp. 160, 161.
2. **VENDOR AND PURCHASER.—Contract for Sale of Real Estate.—Construction.**—On appeal to the equity side of the court, a contract for the sale of real estate will be so construed as not to give either party an unfair advantage. p. 160.
3. **COVENANTS.—Warranties Against Incumbrances.—Sewer Assessment.**—A lien for a sewer assessment, growing out of the construction of a sewer after the execution of a contract for the sale of real estate, and prior to the execution of a deed pursuant to such contract, is not covered by the covenants of warranty in such deed. p. 161.
4. **COVENANTS.—Warranties Against Incumbrances.—Scope.**—Although a lien created solely by operation of law after the execution of a contract for the sale of real estate is not embraced in the covenants of warranty in the deed subsequently executed pursuant to such contract, such lien, having attached, would be covered by the warranties in a deed executed by such vendee on his conveyance of such real estate. p. 163.

From Superior Court of Marion County (78,866); *Vinson Carter*, Judge.

Action by Leroy Templeton against Albert C. Kimberlin and others. From a judgment for plaintiff, the defendants Albert C. Kimberlin and James A. Wilson appeal. *Affirmed.*

John O. Spahr, James A. Ross, David R. Murray and Matson, Gates & Ross, for appellants.

Barrett & Barrett, Denny, Bowen & Denny, Ayres & Ayres and Jones, Hammond & Jones, for appellees.

SHEA, J.—This action was brought by appellee, Leroy Templeton, against appellants and his coappellees, Horatio S. and Annie M. Garner, Mary C. Kimberlin and Mamie

E. Wilson, to recover damages for an alleged breach of certain covenants in a chain of warranty deeds executed by Horatio S. Garner and Annie M. Garner, his wife; James A. Wilson and Mamie E. Wilson, his wife; Albert C. Kimberlin and Mary C. Kimberlin, his wife; in the order named. The alleged breach consisted in the existence of and subsequent discharge by appellee Templeton of a certain municipal assessment which is alleged to have become a lien on the land conveyed prior to the first conveyance by Garner and his wife. The cause was tried by the court, a special finding of facts made, and conclusions of law stated thereon.

The substance of the special findings is as follows: On and prior to May 3, 1906, Horatio S. Garner was the owner in fee simple of certain described real estate in Marion County, and on that day entered into a written contract with George Brannon as follows:

“Indianapolis, Indiana, May 3rd, 1906.

Cline & Wilkins, Agents. I will give the sum of Eighteen Thousand Dollars (\$18,000.00) payable as follows: Seven Thousand (\$7,000.00) Dollars in cash, balance in two equal payments payable on or before one and two years after date, with five per cent (5%) interest, payable semi-annually; for the real estate described as follows: (here follows description of real estate), being all the land I own in said section and township, same to be free and clear of all encumbrances, excepting taxes for the year 1906 payable in 1907, warranty deed and abstract showing good title to be furnished me. (Signed) G. H. Brannon.

I accept the above proposition with the above alterations this 3rd day of May, 1906. (Signed) H. S. Garner.

I accept H. S. Garner's alterations in the above proposition this 3rd day of May, 1906, at 4:30 o'clock P. M. (Signed) G. H. Brannon.”

On May 8, 1906, Garner furnished an abstract of title to the real estate, which he claimed showed a good title in him, to said Brannon. The latter's attorneys claimed some question might be raised by future purchasers, and a decree quieting the title should be secured. Garner, while claim-

ing this was unnecessary, did institute suit, and on April 4, 1907, secured a decree quieting title to the land. Thereafter he demanded that Brannon accept a deed for the land and pay purchase price. Brannon delayed doing so, and made another claim of an apparent defect, demanding that there be a second suit to quiet title and decree obtained. Garner then informed Brannon he had an offer for the land in a much larger sum than that stipulated in the contract, and offered to rescind the contract. This Brannon refused to do, stating he would hold Garner on his contract. In the meantime Cline & Wilkins, real estate brokers, sued Garner and obtained a judgment for \$360 for commission in making the sale to Brannon. Brannon then proposed to pay this judgment, which was to be considered a credit on the purchase price of the land, to which Garner consented. Brannon made the payment and procured Garner's receipt therefor, which included an agreement to procure another decree quieting title, and reads as follows:

“Indianapolis, Ind., February 1, 1907.

“Received of George H. Brannon the sum of Three Hundred and Sixty (\$360.00) Dollars being part payment on fifty-five (55) acres of ground more or less * * * being all the land I own in said section, as per contract dated May 3rd, 1906, between George H. Brannon and H. S. Garner, and the said H. S. Garner hereby agrees to quiet title to the above described lands making title satisfactory to our attorney Elmer E. Stevenson, same to be deeded when quieted, free and clear of all incumbrances or liens, which amount is to be deducted from the cash payment of the purchase price of the above described real estate. Said sale is to be closed up within ten days after title is perfected by decree of court, and if said George H. Brannon fails to comply with said contract and close said sale within said ten days as above specified, he is to hereby forfeit to said H. S. Garner above said sum of three hundred and sixty dollars. (Signed) H. S. Garner.”

Garner instituted a second suit to quiet title and secured a decree to that effect on June 24, 1907. On July 13, 1907,

appellant Wilson informed Garner that he (Wilson) was the owner of the contract dated May 3, 1906, and demanded that the land be conveyed to him. This Garner declined to do because Brannon had not assigned his contract in writing. Wilson then had Brannon endorse upon the contract: "Sold to James A. Wilson and ordered Garner deed property to him. (Signed) G. H. Brannon." On June 6, 1906, the board of public works of the city of Indianapolis, Indiana, adopted a resolution for the construction of a sewer in said city, and on July 13, 1906, the contract for the improvement was let to the Julius Keller Construction Company. The sewer was constructed and accepted by the board, and the real estate involved in this action was assessed with benefits amounting to \$2,774.95, which assessment was confirmed on February 10, 1908, and became a lien upon the real estate. On July 13, 1907, appellee, Garner and wife, executed to appellant Wilson their warranty deed for the tract of land, which was duly recorded July 15, 1907; on December 23, 1907, appellant, Wilson and his wife Mamie E. Wilson (appellee), executed to appellant, Kimberlin, a warranty deed for the real estate, which was duly recorded December 26, 1907, and Wilson received the consideration therefor. On January 22, 1908, appellant, Kimberlin, and Mary C. Kimberlin, his wife (appellee), executed and delivered to appellee, Templeton, their warranty deed for the land, which was recorded the same day, and Templeton paid the consideration therefor to Kimberlin. Templeton became and is now the owner of the real estate. The municipal assessment became a valid and enforceable lien against the real estate on July 13, 1906; that same was not paid, and the assessment was assigned to the German Investment and Securities Company. On May 27, 1908, said company instituted proceedings to foreclose the lien of the assessment, Garner, Wilson, Kimberlin, Templeton and their wives being made defendants in the action. The German Investment and Securities Company obtained a judgment and decree foreclosing

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the lien in the sum of \$3,148.94. Templeton, in order to save the real estate from sale, on July 15, 1909, paid to the sheriff of Marion County the sum of \$3,261.14, in full satisfaction of the lien and judgment, no part of which has been repaid to him. The court found there is due and owing Templeton from appellants on account of said assessment, interest and costs and judgment rendered thereon and attorney fees, a total of \$3,411.14 with 6% interest from July 15, 1909 to the date of entering of this judgment, and he is entitled to recover costs of these proceedings from appellants. At the time of the execution of the deed by Garner to Wilson, said Garner and wife and Brannon and Wilson had no actual knowledge of the existence of the sewer assessment lien, but had such constructive notice as they are chargeable with by law.

Upon these facts the court stated its conclusions of law to be: (1) that the lien for the sewer assessment which was made after the contract of sale of the real estate in controversy, is not an incumbrance within the meaning of the warranty of appellees, Horatio S. and Annie M. Garner; (2) that appellee, Templeton, is not entitled to recover as against Garner and Garner, and that said Garner and Garner are entitled to recover their costs; (3) that appellee Templeton is entitled to recover judgment against appellants in the sum of \$3,411.14 and interest thereon from July 15, 1909, together with costs of this proceeding; (4) that appellants are not entitled to recover or have any relief on their cross-complaint as against Horatio S. Garner and wife. Judgment was rendered in accordance with the findings and conclusions of law.

It is assigned that the court erred in overruling appellants' demurrer to the special answer filed by Garner and Garner to appellants' cross-complaint, and in each conclusion of law upon the facts found. Appellants concede that the errors assigned for a reversal present precisely the same question, and may all be determined from a consideration

of the conclusions of law upon the facts found, to each of which exception was duly taken.

The important question in this case is to determine the effect of the contract entered into between appellee, Garner and Brannon, and its subsequent effect upon appellants and appellee, Templeton. It is earnestly insisted on behalf of appellants that because of the fact that at the time the deed was actually executed to appellant, Wilson, although subsequent to the execution of the contract, a lien had attached to the real estate for certain sewer assessments made by the city of Indianapolis in a general plan of improvement in that section of the city, that there was a breach of the covenants of warranty made by Garner to Wilson, hence the primary liability of Garner as the remote grantor, under a rule which they insist is well established and amply sustained by authority in this State. There is an abundance of authority with respect to the liability of grantors in a chain of title, and that question need not be discussed here in order to dispose of the question involved in this appeal. If the lien which attached because of the public improvement mentioned was such a lien as was covered by the covenants of warranty in the deed made by Garner to Wilson under the facts stated, then the liability of Garner is established.

We think it may be conceded as a general rule that where there is a contract for the sale of real estate, the vendee becomes the equitable owner thereof, the vendor simply holding the title as security for the purchase money. The vendee being the equitable owner, secures all the benefits, and assumes all the risks of ownership.

This doctrine is amply sustained in 1 Pomeroy, Eq.

2. Jurisp. §368; 4 Pomeroy, Eq. Jurisp. §1406. This being an appeal to the equity side of the court, it is our duty to construe the contract so as not to give either party an unfair advantage. In the case of *Hunter v. Bales* (1865), 24 Ind. 299, 302, it is said: "In equity, a contract

for the sale of land is not merely executory, but the

1. vendee becomes the owner, and the vendor is seized in *trust* for him, and has a mere lien on the land for the purchase money, upon the maxim that 'equity looks upon that as done which is agreed to be done.' The contract, however, which in equity will make him the owner, must be a valid contract; must be such that he has a *right to pray* a specific performance of it. Equity looks upon that as done which is thus agreed to be done, and it relates back to the contract." In the case of *Sutherland v. Goodnow* (1884), 108 Ill. 528, 48 Am. Rep. 560, the court quotes with approval from Bouvier's Dictionary as follows: "See Bouv. Law Dic. 495, title 'Sale', 15. At law a deed is essential to vest title to real estate, but in equity the title will be treated and protected as being where the parties have contracted it shall be, for that purpose holding the vendor as trustee of the legal title for the benefit of the vendee, while the latter is looked upon as trustee of the purchase money for the benefit of the vendor. Bisph. Eq. (2d ed.) 423; 2 Bouv. Law Dic., *supra*." See, also, *Wiseman v. Beckwith* (1883), 90 Ind. 185, 190; *Thompson v. Norton* (1860), 14 Ind. 187; *Broker v. Scobey* (1877), 56 Ind. 588, 593; *Caldwell v. Bank of Salem* (1860), 20 Ind. 294, 296; *Webster v. Major* (1904), 33 Ind. App. 202, 213, 71 N. E. 176. We take it, therefore, that this must be accepted as the sound doctrine to be applied to the facts in this case.

The case of *Carey v. Gundelfinger* (1895), 12 Ind. App. 645, 40 N. E. 312, is in its facts almost identical with the case at bar. It is expressly held in that case that a

3. lien for a street assessment is not one covered by the covenants of a warranty deed. The reasons given therefor are equitable and just, and are amply sustained by authority. The same rule must apply to sewer assessments. The case of *Gotthelf v. Stranahan* (1893), 138 N. Y. 345, 20 L. R. A. 455, is an interesting case, and goes into

a full discussion of the principles involved in this case. The facts were as follows: The date fixed by the contract for the conveyance of certain city lots with covenants against incumbrances, was postponed a number of times for the mutual accommodation of the parties; finally the vendor tendered a conveyance with covenants of warranty; prior to that time, and subsequent to the original contract, assessments were made against the lots under the charter of the city in which they were located, for public improvements. The court held that such assessments were not incumbrances within the meaning of the contract, and that the vendor was not bound to warrant the title as against such assessments. "The contract to convey free from incumbrances ordinarily has reference to incumbrances or liens actually existing when the contract is executed, or thereafter created, or suffered by the act or default of the vendor. While the assessments in question constituted, under the charter of Brooklyn, liens on the lands assessed from the time of their confirmation by the common council, and are, in a strict sense, incumbrances thereon, we are of opinion that they are not incumbrances within the meaning of the contract. They did not diminish the value of the subject of the contract. The plaintiff will acquire what the defendant intended to sell and what he expected to receive, and, but for the postponement of the time of the execution of the deed, the plaintiff would have taken his title before the assessments were laid. This incident ought not to impose upon the defendant a loss *pro tanto* of so much of the purchase money." In the same case, it is also said: "It is impossible to suppose that the parties contemplated when the contract was executed that incumbrances created by the force of public law for improvements initiated after the making of the contract and intermediate that date and the time fixed for the conveyance should be paid by the vendor. If the contract can have this construction, then the plaintiff is entitled to prop-

erty not in the condition it was in when he contracted to purchase it, but an improved estate, improved at the expense of the vendor by the act of the city, which he could not control, initiated after the contract was made. This construction would compel the vendor to pay out of the purchase money the cost of an improvement which by so much has increased or will increase the value of the property, and the vendee would acquire property which he did not pay for."

It is earnestly insisted by appellants that the case of *Horner v. Lowe* (1902), 159 Ind. 406, 64 N. E. 218, together with many authorities cited, supports their contention, and that the principles therein stated are applicable to the facts in this case. It is our opinion that the facts in *Horner v. Lowe, supra*, and other cases cited by appellant are easily distinguishable from the facts in this case, and the doctrine here announced is not in conflict with the doctrine laid down in those cases.

Appellants also insist that if appellee Garner is to be relieved from the covenants of warranty on his deed, the same rule must be applied to appellants as to their

4. covenants of warranty, as they conveyed the property without knowledge of the existence of the lien imposed thereon. We think, however, that the distinction is made clear in the cases cited and relied on by appellee that where a lien is created by operation of law and not by the act of the vendor subsequent to the execution of the contract, and prior to the execution of the deed, the rule above stated, invoked in the case at bar, applies, whereas if the lien has already attached when the vendee acquires the property, and he disposes of it by warranty deed with the lien unsatisfied, then his covenants of warranty cover the lien so attached, and he is obliged under the rule to discharge it. This being the settled law, no error was committed by the court in overruling appellants' demurrer to the special an-

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swer filed by Garner and Garner to their cross-complaint, neither did the court err in its conclusions of law. Judgment affirmed.

NOTE.—Reported in 102 N. E. 160. As to breach of covenant of warranty, see 14 Am. Dec. 53; 24 Am. St. 266; 122 Am. St. 852. See, also, under (1) 39 Cyc. 1612; (2) 9 Cyc. 587; (3) 11 Cyc. 1114, 1115; 39 Cyc. 1497.

COHEN ET AL. v. REICHMAN ET AL.

[No. 8,048. Filed June 26, 1913. Rehearing denied November 7, 1913. Transfer denied December 10, 1913.]

1. **APPEAL.—Assignment of Errors.—Ruling on Motion to Suppress Deposition.—New Trial.**—The ruling on a motion to suppress a deposition cannot be assigned as independent error on appeal, but should be assigned as one of the grounds for new trial. p. 167.
2. **DEPOSITIONS.—Motions to Suppress.**—A motion to suppress a deposition should be made before the submission of the cause for trial. p. 167.
3. **DEPOSITIONS.—Service of Notice.—Service on Attorney.**—An acknowledgment of the service of notice to take a deposition duly made by the attorney for the party to whom the notice was directed is conclusive against a motion to suppress the deposition for want of service of such notice. p. 167.
4. **APPEAL.—Presentation of Questions Below.—Errors Occurring at Trial.**—Errors occurring at the trial are not available on appeal unless assigned as cause for new trial and presented to the trial court for correction. p. 167.
5. **APPEAL.—Questions Reviewable.—Instructions.**—Only instructions to which objections were made and which were assigned as causes for a new trial can be considered on appeal. p. 168.
6. **APPEAL.—Review.—Harmless Error.—Instructions.**—Instructions subject to the objection that they required appellants to prove the averments of their counterclaim “by a preponderance of all the evidence in the cause,” were harmless, in view of another instruction upon the burden of proof clearly stating that, in determining any fact or issue, the jury must reach its conclusion by considering only the evidence tending to establish such fact or issue and the evidence to the contrary. p. 168.
7. **APPEAL.—Review.—Harmless Error.—Instructions.**—An instruction on the burden of proof relative to a counterclaim filed by appellants, which, when considered in its entirety, simply informed the jury that if appellees had proved the allegations of their complaint, the appellants, before entitled to a reduction of

the amount of the claim, must have proved by a preponderance of the evidence that, because of appellees' refusal to perform their contract as alleged, they were damaged in one or more of the particulars enumerated in their counterclaim, was not fatally erroneous either on the ground that it required appellants to make their proof "by a preponderance of all the evidence in the cause," or on the ground that it deprived the appellants of the benefit of nominal damages if they proved a violation of the contract. p. 168.

8. DAMAGES.—*Failure to Award Nominal Damages.—Appeal.*—A judgment will not be reversed solely for a refusal to assess nominal damages. p. 169.

9. APPEAL.—*Review.—Harmless Error.—Instructions.*—An instruction, objected to as assuming certain facts, though loosely drawn in that respect, was not erroneous, where it appears from a consideration of all the instructions that the jury was not led to believe that the court had assumed any fact as true. p. 169.

10. APPEAL.—*Review.—Harmless Error.—Instructions.*—Where appellants pleaded a counterclaim for damages resulting from their loss of credit by reason of the suit instituted against them by appellees, the error in an instruction stating that to prove such loss of credit "there must be direct evidence connecting the refusal of the credit with the bringing of the suit," was harmless, where such instruction, considered as a whole with the other instructions, could only mean to the jury that the fact of loss of credit must be directly connected with the bringing of the suit to form any basis for damages, and not that the jury was limited to any particular class of evidence. p. 170.

11. APPEAL.—*Review.—Exclusion of Evidence.*—Evidence of loss of credit, offered in support of a counterclaim grounded on a loss of credit by appellants through the institution of the suit against them, was neither relevant nor competent and was properly excluded, in the absence of a showing that such loss of credit resulted from, or that those refusing the credit were in any way influenced by, the filing of the suit. p. 170.

12. APPEAL.—*Presenting Questions for Review.—Exclusion of Evidence.*—In order to present error on the refusal of the trial court to admit certain evidence, the question propounded should be set out in the record together with a statement of what the answer was expected to prove. pp. 170, 171.

13. TRIAL.—*Reception of Evidence.—Duty to Show Relevancy.*—Where offered evidence does not appear relevant to the issues, the one offering it should either introduce such evidence as will show its relevancy, or, by statement satisfactory to the court, show that the offered evidence will be connected by other proof so as to make it relevant and competent. p. 171.

Cohen v. Reichman—55 Ind. App. 164.

From Superior Court of Marion County (81,354);
Charles J. Orbison, Judge.

Action by Lee Reichman and others against Hymen Cohen and others. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

Mitchel S. Meyberg and *Berne B. Cohen*, for appellants.

William A. Pickens, *Linton A. Cox* and *Earl R. Conder*, for appellees.

FELT, J.—Appellees brought suit against appellants on an account for goods, wares and merchandise sold and delivered in the sum of \$2,856.12. The complaint was answered by a general denial and the appellants also filed a pleading in the nature of a counterclaim, denominated a cross-complaint, in which it is averred in substance that appellants were and for many years had been engaged in the jewelry business in Indianapolis, Indiana, and had bought large amounts of merchandise from wholesale houses on credit; that credit was essential to their business; that on September 2, 1909, appellees entered into a contract with appellants whereby the latter purchased merchandise to the amount of \$2,856.12 on credit and as a part of the contract of purchase, appellees agreed that the amount should be charged as an open account for ten months and that at the expiration of that time they would accept as payment thereof appellants' note for said amount due on December 31, 1910; that appellants complied with their agreement, tendered said note and appellees refused to accept the same and abide by said contract, and demanded immediate payment of the account in cash; that in violation of said contract, this suit was instituted on August 16, 1910, to collect said account; that by the failure of appellees to comply with said agreement and by the institution of said suit, appellants' business was greatly damaged,—firms which previously gave them credit, refused to ship goods to them except for cash on delivery and others refused to sell to

them at all; that they have been put to great expense in hiring a lawyer to defend said suit and have been damaged in their business and credit in the sum of \$5,000. To this pleading a general denial was filed. The cause was submitted to a jury for trial, and a verdict returned in favor of appellees for \$2,979.88, and against appellants on the counterclaim.

Appellants filed a motion for a new trial which was overruled and this appeal prayed and granted. The errors

assigned are the overruling of a motion to suppress

1. certain depositions and overruling the motion for a new trial. The first is not a proper assignment of error on appeal. It was, however, assigned as one of the grounds of the motion for a new trial, where it properly belongs. *Louisville, etc., Traction Co. v. Worrell* (1906), 44 Ind. App. 480, 483, 86 N. E. 78. A new trial was also asked for alleged error in giving to the jury instructions Nos. 6 and 7 and in excluding certain evidence.

The motion to suppress the depositions was on the ground that "no notice was served upon the defendants of the taking of said depositions". The motion was prop-

2. erly overruled, because the record shows that the motion was not made until after the cause was submitted to the jury for trial, which under the statute, is too late for a motion of this kind. §455 Burns 1908, §439 R.

S. 1881. Furthermore, the transcript shows that ap-

3. pellants' attorney of record duly acknowledged service of notice of the taking of the deposition, which is of itself conclusive proof that the depositions should not have been suppressed for the reason assigned in the motion. §437 Burns 1908, §421 R. S. 1881. In their briefs, appellants argue the question that the proof of service of the notice was not duly made, but no such question was presented to the trial court by the motion to suppress

4. or by the motion for a new trial. Errors occurring at the trial are not available on appeal unless assigned

as cause for a new trial and presented to the trial court for correction. *Siberry v. State* (1896), 149 Ind. 684, 690, 39 N. E. 636, 47 N. E. 458; *Stephens v. Smith* (1901), 27 Ind. App. 507, 509, 61 N. E. 745.

Appellants argue objections to several instructions, but only instructions to which objections were made and which were assigned as causes for a new trial, can be con-

5. sidered on appeal. Instructions Nos. 6 and 7 given by the court are the only ones presented for our consideration. Objection is urged to instruction No. 6 on the ground that it placed upon appellants a greater burden than the law warrants by requiring them to prove 6. "by a preponderance of all the evidence in the cause", the averments of their counterclaim. The same objection is also urged against instruction No. 7. The phrase to which objection is urged is subject to criticism for the proof required should have been limited to that which was relevant to the particular issue or pleading to which reference was made in the instruction. However, the court in instruction No. 3 upon the burden of proof, clearly expresses the idea that in determining any fact or issue, the jury must reach its conclusion by considering only the evidence "tending to establish" such fact or issue and "the evidence to the contrary." Furthermore, in-

7. instruction No. 6 when read in its entirety, simply told the jury that in case appellees had proven the material allegations of their complaint "before defendants can reduce the amount of the claim", they must prove, by a preponderance of the evidence, that because of the refusal of appellees to perform the terms and conditions of their contract, as alleged, the appellants have been damaged in one or more of certain enumerated particulars, the first of which is "that defendants' credit and business standing has been damaged." Used in this connection, we do not believe the phrase complained of led the jury to understand that it should consider any evidence other than that relating

to the counterclaim in determining whether its averments were established by the evidence. The error, if any, was therefore harmless. *Pittsburgh, etc., R. Co. v. Reed* (1909), 44 Ind. App. 635, 646, 88 N. E. 1080; *Kingan & Co. v. Gleason* (1914), 55 Ind. App. 684, 101 N. E. 1027. If the instruction had any harmful tendency at all, it was more against appellees than in their favor as it practically assumes as a fact, the failure on their part to comply with the conditions of their contract. But appellants contend that the instruction is erroneous and harmful, for the reason that in reducing the amount of appellees' demand, the instruction limited them to proof of actual damages in certain enumerated particulars; that they were entitled to the benefit of nominal damages in this respect if they proved a violation of the alleged contract, without proof of actual or special damages. It must be observed that the court in this instruction was not stating what appellants must prove, to be entitled to recover on their counterclaim, but what was necessary to enable them to reduce appellees' claim, provided the proof authorized a recovery by appellees on their complaint. Mere nominal damages could not reduce the amount in any substantial sum and to have thrown into the instruction the idea of nominal damages would have only tended to confusion, could have benefited no one and would not have affected the result in any particular sense.

It has been held many times that a judgment will

8. not be reversed where the only error is a failure to assess nominal damages and in any view of the question here presented, the error, if any, is of no more, and seemingly of less, consequence than a failure to assess nominal damages in favor of a litigant entitled thereto.

Instruction No. 7 is further criticised as assuming facts and not leaving them to be determined by the jury, and also as requiring certain proof to be made by direct evi-

9. dence. The instruction, when read in connection with the others given, would not lead the jury to

understand that the court assumed as true any fact
10. in issue, though the language might have been more guarded in this particular. The most serious objection pointed out, is that the court, after calling attention to the proposition that the mere fact of loss of credit by appellants was not proof that such loss or injury was caused by the bringing of this suit against them, said "but there must be direct evidence connecting the refusal of the credit with the bringing of the suit." This phrase, standing alone, is an erroneous statement of the law, for the proof, if sufficient, whether direct, circumstantial or otherwise, would establish the fact. The remaining question therefore is, was the error harmful to appellants. Used in the connection in which the language was employed, and considered with the other instructions, we are convinced the instruction as a whole meant, and could only mean to the jury, that the fact of loss of credit must be directly connected with the bringing of this suit, to form any basis for damages, and not that the jury was limited to any particular class of evidence in determining whether such connection was or was not proven. The instructions, when considered as a whole, state the law fairly and accurately and do not disclose any error prejudicial to the rights of the appellants. There are some slight inaccuracies, but on the whole it appears that the jury was clearly informed as to its duty, and the record discloses nothing in the instruction which deprived appellants of a fair and impartial trial on the merits of the case.

Appellants have not brought the evidence to this court except a small portion thereof to show alleged error in the exclusion of certain evidence. The questions to
11. which objections were sustained, and the offer to prove, indicate that the answers were intended to show a loss of credit to appellants after appellees
12. began this suit. There is no showing, either by the evidence introduced or by an offer to prove, that those

who denied appellants' credit knew of the filing of the suit, or were in any way influenced thereby in denying such credit. If error is predicated on the exclusion of evidence, the question should be set out and there should be a statement of what the answer was expected to prove. If the

evidence, when offered, does not appear relevant to

13. the issues, the one offering the testimony should either introduce such evidence as will show its relevancy, or by statement satisfactory to the trial court, show that the offered testimony will be connected by other proof so as to make it relevant and competent. Elliott, App. Proc. §823; *Conden v. Morning Star* (1884), 94 Ind. 150; *Hitz v. Warner* (1911), 47 Ind. App. 612, 619, 93 N. E. 1005; *Williams v. Chapman* (1903), 160 Ind. 130, 66 N. E. 460; *Shorb v. Kinzie* (1881), 80 Ind. 500; *Hedrick v. Osborne & Co.*

(1884), 99 Ind. 143. The testimony in this case,

11. tending to show loss of credit was neither relevant nor competent, unless the loss of credit was due to the filing of this suit in violation of the alleged contract. As there was no showing to this effect, it was not error to exclude the testimony tending to show loss of credit.

Upon the whole, the case seems to have been fairly tried and substantial justice to have been done between the parties. No error harmful to appellants having been pointed out, the judgment is affirmed.

NOTE.—Reported in 102 N. E. 284. See, also, under (1) 2 Cyc. 999; (2) 13 Cyc. 973; (3) 13 Cyc. 912, 913; (4) 29 Cyc. 736; (5) 2 Cyc. 700; 29 Cyc. 744; (6) 38 Cyc. 1750, 1782; (8) 3 Cyc. 446; (9) 38 Cyc. 1672; (10) 38 Cyc. 1778, 1779; (11) 38 Cyc. 1411; (12) 3 Cyc. 165; (13) 38 Cyc. 1329.

**BOMBOLASKI ET AL. v. FIRST NATIONAL BANK OF
NEWTON, ILLINOIS.**

[No. 7,993. Filed May 16, 1913. Rehearing denied December 11, 1913.]

1. **BILLS AND NOTES.—Place of Execution.—Presumptions.**—A note bearing date as of a certain time and place within the State, will be presumed in an action thereon to have been executed in the State. p. 175.
2. **BILLS AND NOTES.—Negotiability.—Note Payable in Another State.**—The negotiability of a note executed in this State, and by its terms made payable in another, must be determined by the law of the state where payable, hence a note executed in this State and made payable at a place in Illinois, which was negotiable by the law of that state, must be treated as negotiable in an action thereon in this State, although it does not conform to the standard of negotiability fixed by the statute of this State; and, being in the hands of a *bona fide* holder, it was not subject to defenses existing against the payee. (*Mix v. State Bank* [1859], 13 Ind. 521; *Patterson v. Carrell* [1877], 60 Ind. 128; *Fordyce v. Nelson* [1883], 91 Ind. 447; *Midand Steel Co. v. Citizens Nat. Bank* [1901], 26 Ind. App. 71; *Garrigue v. Kellar* [1905], 164 Ind. 676; and *Ray v. Baker* [1905], 165 Ind. 74, distinguished.) pp. 175, 178.
3. **BILLS AND NOTES.—Negotiability.**—The question of negotiability or nonnegotiability of a note is one of construction or interpretation to be determined from the form and conditions of the instrument in view of the law subject to which it was made, and, since the quality and character of a note as to being negotiable or nonnegotiable attaches at the time and place of its inception and remains impressed upon it throughout its existence, the negotiability or nonnegotiability of a note in the state or country of its legal origin cannot be changed or affected by the subsequent transmission of such note to another jurisdiction. p. 178.
4. **BILLS AND NOTES.—Negotiability.—Determination.**—The negotiable or nonnegotiable quality of a note depends upon the law subject to which it was made, and in arriving at a determination of the question whether it is subject to the law of a jurisdiction other than that in which it was executed, or to the law of the place where executed, the intent of the parties as expressed in the obligation will control, and the provision in a note for its payment at a place outside the jurisdiction in which it was executed gives rise to the presumption that the parties intended its negotiability to be controlled by the law of the jurisdiction in which it was made payable, while a failure to specify a place of payment

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warrants the presumption that it was payable in the jurisdiction where executed, and its quality will be determined by the law of that place. p. 178.

5. **BILLS AND NOTES.—Delivery.—Negligence of Makers.**—Where a negotiable note given for the price of a stallion was not to be delivered until nine persons having shares in the horse had signed it, but the payees were permitted to have possession of the note before it had been signed by all the shareholders, and were thus enabled through the negligence of the makers to transfer it to a *bona fide* holder for value, when it was signed by only six of the shareholders, the makers were not entitled to urge want of delivery as a defense in an action thereon, and the court did not err in sustaining demurrers to their answers setting up such defense. p. 182.

6. **BILLS AND NOTES.—Defenses.—Nondelivery.—Answer.—Sufficiency.**—In an action by the *bona fide* holder of a note against the makers, an answer alleging that the note was executed for the purchase price of a stallion, with the agreement that the price was to be divided into ten shares of the value of \$200 each of which one of the makers of the note was to take two shares and the remaining purchasers, including the other defendants, were to take one share each, that each purchaser should be liable on the note only to the amount represented by his share, that the note was not to be delivered or become effective until signed by all the purchasers, that the defendants signed the note but that the other purchasers did not sign it or pay their share, that defendants demanded a return of the note as soon as they discovered payee's possession, and that it was never delivered to the payee, did not proceed upon the theory that the execution was never completed by any delivery, but upon the theory that there was no valid delivery because possession was acquired before the note was signed by all the shareholders, and was insufficient to constitute a defense to the action. p. 187.

7. **PLEADING.—Non Est Factum.—Sufficiency.**—An answer in *non est factum*, to be sufficient, must deny the execution of the instrument under oath in terms so certain and specific as to warrant a conviction of perjury upon proof of the execution of the instrument. p. 188.

8. **BILLS AND NOTES.—Delivery.—Effect.**—While as a general rule, as between the original parties, the delivery of a negotiable instrument involves not only a change of possession, but also an intent on the part of the one making the delivery that the instrument shall by that act become effective, where the maker of such an instrument through negligence or misplaced confidence permits it to be in the possession of the payee so as to enable him to place it in circulation, the delivery is effective after the instrument has

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reached the hands of a *bona fide* holder, regardless of the maker's intention at the time of parting with the possession. p. 189.

From Perry Circuit Court; *C. W. Cook*, Judge.

Action by the First National Bank of Newton, Illinois, against John Bombolaski and others. From a judgment for plaintiff, the defendants appeal. *Affirmed*.

John W. Ewing, William H. Roose and Dennis F. Seacat, for appellants.

Oscar C. Minor, for appellee.

LAIRY, J.—Appellee sued appellants on a note and recovered. The note sued on was in the words and figures following:

“\$667.00 Siberia, Ind., Nov. 16, 1906. On or before September 1st, 1908, we or either of us promise to pay to McCabe and Lindsey or bearer at the First National Bank of Greenup, Illinois, \$667.00, Six Hundred Sixty-seven Dollars for value received and attorney's fees, with interest at the rate of 6% per annum, annually from date until paid without any relief from valuation or appraisement laws. (Signed) Felix Linetti, William Seiler, Mayes O. Cummins, John Bombolaski, George Seiler, W. E. Wells.”

The complaint counts upon the note and alleges that the plaintiff was a banking corporation located and doing business in the town of Newton, Illinois. Facts are also alleged showing that the bank acquired title to the note in suit by endorsement in writing under such circumstances as would make it a *bona fide* holder if the note is negotiable as an inland bill of exchange. A statute of the state of Illinois on the subject of negotiable instruments is pleaded as a part of the complaint. If the note in suit is to be construed in accordance with this statute as interpreted and applied by the supreme court of that state, it is a negotiable note; but if it is to be construed in accordance with the statute of Indiana on the subject, it is not negotiable for the reason that it is not payable at a bank within the State. §9076

Burns 1908, §5506 R. S. 1881; *Ray v. Baker* (1905), 165 Ind. 74, 74 N. E. 619; *Midland Steel Co. v. Citizens Nat. Bank* (1904), 34 Ind. App. 107, 72 N. E. 290. By certain paragraphs of answer to which demurrers were sustained, the appellants pleaded a defense against the payees of the note. These answers are not models of pleading and it might be difficult to determine from their averments whether they proceed upon the theory of fraud, or upon the theory of a warranty and its breach; but it is practically conceded by appellee that they state facts sufficient to constitute a cause of defense to the note if it is not a negotiable instrument. By sustaining the demurrers to these paragraphs of answer, the trial court held that the note in suit was negotiable.

We are thus confronted with a conflict of laws, and are required to determine whether the character and effect of this note as to its negotiable qualities depend upon the law of the State of Indiana where it was executed, or whether they depend upon the laws of the state of Illinois where the note by its terms was made payable. Where suit is

1. brought in this State upon a contract which does not disclose upon its face the place of its execution, it will be presumed that it was executed in this State. *Rose v. President, etc.* (1860), 15 Ind. 292; *Baltimore, etc., R. Co. v. Scholes* (1896), 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. 307. The note in suit is dated at Siberia, Indiana, and suit is brought to enforce it in this State, and the presumption will be indulged that it was executed in Indiana.

To sustain the ruling of the trial court appellee asserts the law to be, that where a note is executed in one state and, by its terms, is made payable in another, the

2. question of its negotiability is to be determined by the law of the state in which it is payable and not by that of the state in which it was executed. To sustain its position it cites a number of Indiana cases bearing upon the question, but none of them are exactly in point. *Fordyce*

v. *Nelson* (1883), 91 Ind. 447; *Patterson v. Carrell* (1877), 60 Ind. 128; *Midland Steel Co. v. Citizens Nat. Bank* (1901), 26 Ind. App. 71, 59 N. E. 211; *Garrigue v. Kellar* (1905), 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. 324. In the opinion of the court in the case first cited, language is used which apparently is decisive of the question, but an examination of the facts of the case will show that the question was not presented for decision. The note sued on in that case was executed in the state of Missouri and was also payable in that state, and it is quite clear that the law of Missouri would control the question of its negotiability in a suit to enforce it in another state, where the statutes of Missouri were pleaded. The second case cited is similar to the first in that the note in suit was executed in the state of Ohio and was payable in that state. It was held that, as no statute of Ohio was pleaded, it would be presumed that the common law prevailed in that state, and that, the note sued on was not negotiable as an inland bill of exchange for the reason that such notes were not so negotiable by the law merchant, which formed a part of the common law, but are only made so by statute. The facts in the third case are similar to the facts in the case at bar, but the question here presented was not there decided. The note sued on in that case was executed in Indiana and was made payable at a bank in Pennsylvania, and was assigned to a bank at Kokomo, Indiana. The bank sued the maker but did not allege in its complaint, facts showing that a note of the character of the one in suit was negotiable under the statutes of Pennsylvania. The statutes of that state were not pleaded as a part of the complaint and no facts were alleged, therein showing that the bank was a *bona fide* holder of the note. The defendant by way of answer set up a defense against the payee of the note. As a reply to this answer the bank pleaded a statute of Pennsylvania on the subject of commercial paper and alleged that, under the decisions of the supreme court of that state construing that statute, notes

such as the one sued on had been held to be negotiable in that state. Facts were also averred showing that the bank was a *bona fide* holder of the note. The Appellate Court held that the reply was a departure from the theory of the complaint and that a demurrer thereto should have been sustained for that reason. The court did not decide whether the facts stated in the reply were sufficient to show that the note was a negotiable instrument. An examination of the facts presented by the case of *Garrigue v. Kellar, supra*, shows that the note in suit was executed in the state of Illinois and was by its terms payable at a bank in Indiana. Under the statutes of Illinois a married woman may, by contract, become liable as surety, but in Indiana a married woman is prohibited by statute from entering into any contract of suretyship. An action was brought to enforce the note in this State and Mrs. Garrigue answered, setting up her coverture and her suretyship. As a reply to this answer, the statute of Illinois was pleaded and it was further averred that the note was executed and delivered in that state for money there loaned. It was held that the question of her liability on the note as surety was controlled by the law of the state where it was executed and not by that of the state wherein it was payable. The question for decision in this case depended upon the capacity of one of the parties to bind herself as a surety. Questions pertaining to the formal validity of a contract or the capacity of the parties are always determined by the *lex loci contractus*. For the reason stated, this case is not decisive of the question here presented. In the case of *Ray v. Baker* (1905), 165 Ind. 74, 74 N. E. 619, the note sued on, was dated at Lebanon, Indiana, and was payable at the Citizens Bank of Homer, Illinois. The statute of Illinois was not pleaded and the court would presume that the common law was in force in that state. The court held that the note was not negotiable under the laws of Indiana, but the question as to whether

it was negotiable as an Illinois contract was not presented or decided. The case of *Mix v. State Bank* (1859), 13 Ind. 521, may be distinguished in the same manner.

The question of negotiability or nonnegotiability of a note is one of construction or interpretation. It is determined by the form and conditions of the instrument

3. when considered in the light of the law subject to which it is made. The quality and characteristics of a note as to its negotiability or the want of it attach at the time and at the place such note has its legal inception. When its obligations attach and it comes into legal being, it is either negotiable or nonnegotiable, and the quality thus impressed upon it at its inception will not be altered, either by lapse of time or change of place. If a note is nonnegotiable in the state or country where it has its legal origin it can not become negotiable because at a subsequent time it is carried or transmitted to another jurisdiction.

Unquestionably the note in suit had its legal inception in Indiana, and if it is to be construed by the *lex loci contractus*, it was nonnegotiable in this State and it was

2. therefore nonnegotiable in Illinois or any other state.

It was payable, however, in the state of Illinois and if the *lex loci solutionis* is to control its interpreta-

4. tion, it was negotiable in Indiana at the time of its inception, and it was therefore negotiable in Illinois or in any other state. Where a contract is made in one state and, by its terms provides for its performance in another, and the laws of the two states differ, no fixed rule can be announced by which it can be determined in every case which law shall apply. Where the parties have manifested an intention in good faith to make their contract subject to the laws of one or the other of such states such intention will be given effect in construing the contract and determining the reciprocal rights and duties of the parties thereunder; but if the question to be decided relates to the formal validity of the contract or to the capacity of the

parties, such question is to be determined in accordance with the *lex loci contractus* without regard to the intention of the parties. 2 Wharton, Conflict of Laws (3d ed.) §§427e-427n; *Scudder v. Union Nat. Bank* (1875), 91 U. S. 406, 23 L. Ed. 245; *Phoenix Mut. Life Ins. Co. v. Simons* (1893), 52 Mo. App. 357; *Hager v. National, etc., Bank* (1898), 105 Ga. 116, 31 S. E. 141; *Campbell v. Crampton* (1880), 18 Blatch. 150; *Matthews v. Murchison* (1883), 17 Fed. 760; *Hunt v. Jones* (1879), 12 R. I. 265, 34 Am. Rep. 635; *Roubicek v. Haddad* (1902), 67 N. J. L. 522, 51 Atl. 938.

In this case we are concerned only in determining the rights and obligations imposed by the contract, and we desire to limit our observations to the question before us. That the intention of the parties as gathered from the instrument itself shall have controlling weight in determining which of two conflicting laws shall apply to the construction of their contract seems to be supported by reason and possibly by the weight of authority, but the means of ascertaining such intention is not free from difficulty. The parties may stipulate in the contract that it shall be controlled by the laws of a particular state and where this is done in good faith, the question is free from doubt; but where this is not done, the question depends largely upon presumptions. Where a contract fixes no place for performance, the presumption is that it is to be performed in the same state in which it is executed and that the parties contracted in reference to the *lex loci contractus*. *Stickney v. Jordan* (1870), 58 Me. 106, 4 Am. Rep. 251; *New York Security, etc., Co. v. Davis* (1902), 96 Md. 81, 53 Atl. 669; *Dow v. Rowell* (1841), 12 N. H. 49; *Strawberry Point Bank v. Lee* (1898), 117 Mich. 122, 75 N. W. 444. If it is executed in one state and by its express terms is to be performed in another, the first presumption is overcome. In such a case, in the absence of facts and circumstances manifesting a contrary intention, the parties will be presumed to have intended that their contract should be governed by the law of the place of per-

formance. Wharton states the proposition thus: "When there is a conflict between the law of the place where the contract was made and that of the place where it is payable, the great weight of authority accords with the position taken in *ante* §§450, 451, and favors the law of the place where the note or bill is payable, rather than that of the place where the maker's or acceptor's contract was made. This is true, not only as to the ultimate question of liability, but also as to the preliminary question of negotiability as affecting the question of liability * * *". 2 Wharton, Conflict of Laws (3d ed.) §451d; *Brabston v. Gibson* (1850), 9 How. 262, 13 L. Ed. 131; *Calhoun County v. Galbraith* (1878), 99 U. S. 214, 25 L. Ed. 410; *Holmes v. Bank of Ft. Gaines* (1898), 120 Ala. 493, 24 South. 959; *Goddin v. Shipley* (1847), 46 Ky. 575; *Freeman's Bank v. Ruckman* (1860), 16 Gratt. (Va.) 126; *Stevens v. Gregg & Co.* (1890), 89 Ky. 461, 12 S. W. 775; *Carlisle v. Chambers* (1868), 67 Ky. 268, 96 Am. Dec. 304; *Warren v. Lynch* (1810), 5 Johns. (N. Y.) 239; *Curtis v. Hutchinson* (1845), 4 Ohio Dec. 19.

Some of the cases state it as a fixed rule that the law of the place of payment controls the question of negotiability as affecting liability, while others hold that a presumption of intention to this effect obtains in the absence of facts or circumstances showing an intention to the contrary; but as such circumstances seldom, if ever, exist, the distinction is not usually of practical importance. 2 Wharton, Conflict of Laws (3d ed.) §451d. In a few cases it has been held that the place of payment named in a note or bill of exchange is not to be regarded as important in determining which of two conflicting laws shall apply, but these cases are not in line with the current of decisions on this point. *Garrigue v. Kellar, supra*; *Staples v. Nott* (1891), 128 N. Y. 403, 28 N. E. 515, 26 Am. St. 480. In the case first cited, the question presented related to the capacity of a married woman to contract as surety. This question is one pertaining to the formal validity of the contract and its decision is always

controlled by the *lex loci contractus*. What was said upon this question can not be regarded as necessary to the decision as the question presented was properly decided upon other grounds.

From an extended examination of the authorities we have reached the conclusion that the negotiability of the note in suit as affecting liability is to be determined by the law of Illinois. If the note provided that its legal effect should be governed by the law of that state there could be no question; and, as we construe the decisions, a provision for payment in that state gives rise to a presumption to the same effect. It was, therefore, an Illinois contract, the same as though it had been both executed and made payable there, and, being negotiable under the law of that state, it must be held to be negotiable here even though it does not conform to the standard of negotiability fixed by our statute. In the hands of a *bona fide* holder it was not subject to the defense set up by the answers in question, and the court did not err in sustaining the demurrers thereto.

As heretofore stated, our statute in effect provides that notes payable to order or bearer in a bank in this State shall be negotiable as inland bills of exchange. It is suggested that the effect of the holding in this case will be to render this statute partially ineffective. At first blush, there might appear to be some merit to the objection suggested, but when we consider the effect of the decision in connection with the statute it will appear that the objection is without force. Our statute can be given no extraterritorial effect. It applies to all notes payable within this State regardless of the place where they were executed, and to all notes executed in this State which do not specify the place of payment, as all such notes are presumed to be payable in this State.

The court did not err in sustaining demurrers to the second and fifth paragraphs of answer. Both of these paragraphs set up a contract between the payees and nine persons

named, by the terms of which it was agreed that the

5. ownership of the stallion purchased was to be divided into ten shares of \$200 each, which shares were to be taken and paid for by the nine persons named in certain proportions stated. It is averred that under this agreement all of the parties who had agreed to take stock were to sign the note and it was not to be delivered until all had signed. It is also averred that only six of the number signed it and that it was carried away by the payees and was never signed by the other three, and that said note was never delivered to the payees or to any other person. These paragraphs are sworn to and proceed upon the theory that the note in suit was never delivered. These answers disclose that the payees were permitted to have possession of the note before it had been signed by all of the parties who had agreed to take shares, and that they were enabled, through the negligence of the makers in this respect, to place it in circulation. It is well settled that where one of two innocent persons must suffer on account of the wrongful act of a third, that one must bear the loss whose fault or negligence enabled the third person to do the wrong. A want of delivery can not be urged as a defense against a *bona fide* holder of a negotiable note where it appears that the note got into circulation through the fault or negligence of the defendant. *Gould v. Segee* (1856), 5 Duer. (N. Y.) 260; *Clark v. Johnson* (1870), 54 Ill. 296; *Shipley v. Carroll* (1867), 45 Ill. 285; *Kinyon v. Wohlford* (1871), 17 Minn. 239, 10 Am. Rep. 165.

Plaintiff's reply to the eighth paragraph of answer states facts sufficient to avoid the defense set up in that paragraph of answer. A reply in all respects similar was held sufficient in the case of *Bowen v. Laird* (1906), 166 Ind. 421, 77 N. E. 852. The demurrer to the reply was properly overruled.

CONCURRING OPINION.

HOTTEL, J.—The note in suit is not payable “in a bank in this State” and hence is not negotiable as an inland bill of exchange under §9076 Burns 1908, §5506 R. S. 1881. It follows that if the question of the negotiability of such note is to be determined by the law of Indiana, that the prevailing opinion is wrong. In this case, appellee set up in aid of its cause of action a statute of the state of Illinois on the subject of negotiable instruments, and, by the provisions of this statute, the note in suit is negotiable and if the question of its negotiability is to be determined by the Illinois statute, the prevailing opinion is correct. Hence the real question to be determined is, Which of the two statutes must control and determine *the negotiable character* of said note? It will be observed that the prevailing opinion expressly limits the question to be determined to the *negotiability* of the note, and *the law of the state applicable to such question alone*.

We think the statement in the dissenting opinion, that the prevailing opinion holds that the note in suit “is an Illinois contract from its inception” is subject to modification. The effect of the holding in the prevailing opinion, as we understand it, is that, *for the purpose of determining the negotiable character of the note*, it must be treated as an Illinois contract from its inception, and that in determining such question we must look to the law of that state rather than the law of Indiana. This results from the fact that the maker of the note expressly agreed to perform his contract or pay the note at a bank in that state. The opinion impliedly, if not expressly, holds that by agreeing to pay or perform the contract in Illinois the maker did not deprive himself of the benefit of the *lex loci contractus* in so far as the question of the validity of the note and kindred questions might be involved in its collection. The holding that the *lex loci solutionis* rather than the *lex loci contractus* controls

the question of negotiability of a note is, we think, the holding in Indiana and in most jurisdictions, as evidenced by the authorities cited in the prevailing opinion.

We do not understand, as the dissenting opinion seems to intimate, that the prevailing opinion charges the maker of the note in suit with knowledge of the laws of the state of Illinois. It charges him with knowledge of the law of his own State. It is the law of Indiana that the *lex loci solutionis* controls the negotiability of an instrument, unless a different intent is expressed in the instrument itself. Hence when appellants agreed to pay the note in suit at a bank in Illinois, they thereby agreed that in its collection by a suit thereon, the law of that state might be invoked for the purpose of determining the question of its negotiability and that, if such law should be so invoked, that they would be controlled thereby whatever might be its provisions, and regardless of their knowledge of said provisions. In other words, appellants by their express agreement deprived themselves of the benefit of the law of their own state in the matter of the determination of the question of the negotiability of their note.

DISSENTING OPINION.

ADAMS, J.—I am unable to concur in the majority opinion, holding that the negotiability of a promissory note is governed by the law of the place of payment. It is doubtless true that the maker of a promissory note may, by the use of apt words in the instrument itself, expressly contract as to the law that shall govern such note, and his contract will be given effect. But, I insist that a promissory note, executed in Indiana, without any stipulation as to the law governing the same, is an Indiana contract, and, if not made payable at a bank within this State, is not negotiable as an inland bill of exchange. When a note is executed in Indiana, the law of this State, as to its negotiability, is impressed upon it at once, and such note cannot subse-

quently lose its character as an Indiana contract. One who executes a promissory note in this State is presumed to know the statute law of this State, but he is not presumed to know, nor is he bound by the statute law of the state of Illinois, and the statute law of Illinois is not read into, and does not become a part of the note. A note payable within this State, by §9076 Burns 1908, §5506 R. S. 1881, is made negotiable as an inland bill of exchange. If the note is not payable at a bank within this State, it is not negotiable by the law merchant, and this is true of a note executed in Indiana, payable at a bank in Illinois. *Ray v. Baker* (1905), 165 Ind. 74, 89, 74 N. E. 619.

The majority opinion, however, holds that a note executed in Indiana, by a citizen of Indiana, but made payable at a bank in Illinois, is an Illinois contract from its inception, and where suit is brought against the maker in Indiana, and the Illinois statute making all promissory notes negotiable in that state, is pleaded, with other facts, a special answer setting up a defense to the note is not good. It is a general rule that in the absence of an express stipulation to the contrary, a note will be construed according to the *lex loci contractus*, and, under our decisions, I do not believe that the naming of the place of payment in the contract furnishes an exception to the rule. The conclusion reached in the majority opinion is clearly based on the premise that, as appellants executed the note in suit, which was payable at a bank in the state of Illinois, it must follow that their intention was, that the note should be an Illinois contract from its inception, and governed by the Illinois statute, as to its negotiability. In law, as well as in logic, this is a *non sequitur*. Intention to do a certain thing necessarily implies at least presumptive knowledge of the thing intended to be done. We know that even this court does not take judicial cognizance of the statute law of another state until pleaded. How, then, can we consistently charge a citizen of Indiana with actual or presumptive knowledge which this

court itself disclaims? And, if appellants are not presumed to know that all promissory notes are negotiable under the statute of Illinois, how can we say that appellants intended to make their note negotiable, from the isolated fact that it was made payable at a bank in Illinois?

In *Garrigue v. Kellar* (1905), 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. 324, it was held that a contract must be construed under the laws of the state where executed, unless it can be fairly said that the parties at the time of its execution clearly manifested an intention that it should be governed by the laws of another state. In the same case, the court, on page 682, said: "The substantial essence of a contract, evidenced by a promissory note, is the undertaking by the makers to pay the principal sum of money named. The place of payment is an incidental matter. The makers are not discharged from their principal obligation by an unaccepted tender of the amount owing, at the time and place designated for payment, but by such tender are released only from liability for damages which would otherwise accrue from nonpayment. Makers of promissory notes cannot insist that they will pay at the place designated or not at all, but may be sued on their obligation, and payment of the principal amount enforced at any place where jurisdiction over their persons or property may be acquired."

The legal effect of the majority opinion is to bind the maker of a promissory note, not negotiable under the law of the place of execution, by a statute of a foreign state, of which the maker has neither actual nor presumptive knowledge. Such a rule, I believe, would open the door to deception and fraud, and would be taken as an invitation to cut off legitimate defenses, by inserting, as the place of payment, the name of a bank in another state, where all promissory notes are negotiable. I think the majority opinion is in clear antagonism to the principle announced

in the cases herein cited, and that the judgment should be reversed.

ON PETITION FOR REHEARING.

LAIRY, C. J.—Appellants in their reply brief, strongly insist that the verified second and fifth paragraphs of answer are sufficient as answers of *non est factum*.

6. Counsel direct the attention of the court to certain averments in each of these paragraphs which, if considered apart from the other averments of the pleading, would be a sufficient statement of the fact that the execution of the note was never completed by delivery.

The averments denying the delivery of the note in general terms are to be considered and construed in connection with the other averments of the pleading in which they occur. When the other averments are considered, it becomes apparent that the appellants did not intend to deny under oath that the note was placed in the hands of the payee by the makers after it was signed, or at least that they did not intend to deny that the makers without objection suffered it to be in the possession of the payees. The averments of the answers show that the note in suit was given to McCabe and Lindsey as payees for the purchase price of a stallion and that by agreement with the payees the purchase price was to be divided into ten shares of \$200 each; that John Bombolaski was to take two shares and that each of the other defendants was to take one, and that each should be liable on the note signed for the amount represented by the shares which he had agreed to take and for no greater amount. It is further averred that it was expressly agreed by and between the payees of said note and these appellants, that the note was not to be delivered or made effective as a note until the same was signed by all of the persons who had agreed to take the remainder of the shares in such stallion; and that, in pursuance of this agreement, the

appellants named signed the note, but others who had agreed to take shares in the stallion did not sign it or pay their share in cash; and that the appellants demanded a return of said note as soon as they discovered that the payees had carried it away and had it in their possession. The averments on the subject of nondelivery as found in the fifth paragraph are as follows: "They say said note was never delivered by them to the said McCabe and Lindsey, or any other person; that the said note was never delivered by the agent of these defendants to the said McCabe and Lindsey, or their agent, or any other person authorized to receive the same. * * * and said defendants further say that they specifically deny the delivery of the note sued on in plaintiff's complaint."

When the latter averments which we have quoted are considered in connection with the other averments of the answer, we think that it is manifest that the pleading proceeds upon the theory that the possession of the note by the payees was not the result of a valid and effective delivery for the reason that they betrayed the confidence which had been reposed in them by the appellants and carried the note away before it had been signed by all who had agreed to sign it. If such facts were pleaded as a defense in an action by the payees of the note, a different question would be presented, but such facts do not constitute a defense as against an innocent holder. The answers disclose that the note was in the possession of the payees after it had been signed by the appellants, and such possession is not accounted for or explained. It is not averred that McCabe and Lindsey obtained its possession without the consent of appellants, by stealth, or by any fraud, trick, or artifice. If it had been the intention of the appellants to deny that the execution of the note had ever been completed by delivery, they could have done so in plain and unequivocal language. The Supreme Court has held that an answer in *non est factum* is insufficient unless

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the execution of the instrument is denied under oath in terms so certain and specific as to warrant a conviction of perjury upon proof of the execution of the instrument. *Woollen v. Whitacre* (1880), 73 Ind. 198.

As a general rule the delivery of a written instrument involves not only a change of possession but also an intent on the part of the one making the delivery that the instrument shall by that act become effective. This is the rule as affecting negotiable instruments where the question arises between the original parties, but there is a well recognized exception to the general rule where the rights of a *bona fide* holder are involved. If the maker of a negotiable note, by negligence or through misplaced confidence permits the note to be in possession of the payee under such circumstances as enable him to place it in circulation, he will not be permitted to say that he did not intend that the note should become effective at the time he parted with its possession. Such a case calls for an application of the principle, that when one of two innocent parties must suffer because of the wrongful act of a third, the loss must be borne by that one whose fault, negligence, or credulity enabled the third party to do the wrong. *Judy v. Warne* (1913), 54 Ind. App. 82, 102 N. E. 386, and cases there cited.

It is evident that the paragraphs of answer under consideration proceed upon the theory that the payees were permitted to have the note in their possession but that by reason of the agreement set out in these answers, such possession did not constitute a legal delivery. The answers are insufficient on this theory and we are content to adhere to our former ruling as expressed in the original opinion.

Petition overruled.

NOTE.—Reported in 101 N. E. 837; 103 N. E. 422. As to who is *bona fide* holder of negotiable instrument, see 9 Am. Dec. 272; 44 Am. Dec. 698. As to fraud in inception or delivery of note as affecting *bona fide* holder, see 11 Am. St. 309; 37 Am. St. 458. As to the liability to *bona fide* purchaser of a note getting into circulation

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without maker's consent, see 3 L. R. A. (N. S.) 212. As to agreement for other signatures before delivery of note, see 45 L. R. A. 321. As to the conflict of laws as to negotiable paper, see 61 L. R. A. 193; 19 L. R. A. (N. S.) 665. See, also, under (1) 7 Cyc. 636; (2) 7 Cyc. 635, 641; (3) 7 Cyc. 641; (4) 7 Cyc. 635, 638; (5, 8) 8 Cyc. 55; (6) 8 Cyc. 154; (7) 31 Cyc. 189, 529.

INDIANA UNION TRACTION COMPANY v. KRAEMER.

[No. 7,974. Filed June 19, 1913. Rehearing denied December 12, 1913.]

1. **STREET RAILROADS.—Injuries to Persons on Tracks.—Contributory Negligence.—Jury Question.**—Where the evidence showed that plaintiff on starting to cross a street looked for an approaching car, that he could see for a distance of 490 feet and saw none, that when he had walked about forty feet and was six or seven feet from where he was struck, he again looked for a distance of thirty or forty feet and saw no car, the question of whether he was guilty of contributory negligence in failing to look for an approaching car at other times and places before reaching the track was one of fact for the jury. p. 192.
2. **STREET RAILROADS.—Injuries to Persons on Tracks.—Contributory Negligence.—Evidence.**—While a pedestrian, who looks before crossing a street car track, but fails to see an approaching car which is visible, will in case of injury be charged with having seen what he should have seen, where the evidence as to the speed of a car was conflicting and there was evidence from which the jury may have believed that the car approached at an unusual rate of speed, the court cannot say as a matter of law that plaintiff was guilty of contributory negligence, even though he could have seen the car when he looked, since on failing to see the car he may have been justified, from the usual speed of cars in that locality, in believing that he was safe in crossing. p. 192.
3. **STREET RAILROADS.—Injuries to Persons on Tracks.—Contributory Negligence.—Last Clear Chance.**—Where there was evidence showing that a street car motorman saw a pedestrian crossing the street in such a manner that a collision seemed imminent, giving no indication of stopping, and by his conduct and appearance indicating to a reasonably prudent man that he was unconscious of the approach of the car, and saw that such pedestrian was closely approaching a place where he would be struck by the car, and the physical facts tend to show that the motorman could have so operated the car as to have avoided the injury, it be-

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came the duty of such motorman to take all reasonable measures to prevent the collision, and the jury was justified, in view of evidence that the motorman did not stop the car as soon as he could have, in finding defendant liable under the doctrine of last clear chance, regardless of plaintiff's negligence. p. 193.

4. **APPEAL.—Review.—Instructions.**—There was no error in instructing on the doctrine of last clear chance where the issues and evidence warranted the application of the doctrine; nor in the refusal of an instruction stating that if plaintiff's negligence continued to the time of his injury, he could not recover, even if defendant was negligent. p. 194.

5. **STREET RAILROADS.—Injuries to Persons on Tracks.—Contributory Negligence.—Last Clear Chance.**—Where plaintiff was negligent in getting into a place of danger in front of defendant's car, and the motorman saw him and could have avoided or mitigated the danger by the use of reasonable means at his command, the defendant is liable for the injuries sustained by plaintiff, even though the latter's negligence continued to the instant of injury, since in such case the negligence of the motorman in failing to take the proper precautions is regarded as the active or proximate cause of the injury. p. 195.

6. **EVIDENCE.—Admissibility.—Matter Explanatory of Facts in Evidence.**—In an action for injuries sustained by being struck by an electric car, where defendant's attorneys at the trial put in evidence the fact that, though plaintiff claimed that riding on cars caused him great pain, he made a trip on defendant's road about a month after the accident, it was proper to admit the testimony of plaintiff that he made the trip, while suffering much pain, in compliance with the request of defendant's claim agent who told him that defendant might settle, where the court stated that the evidence was not admitted for the purpose of binding defendant in any way, but merely to show why and under what circumstances plaintiff made the trip. p. 195.

From Superior Court of Marion County (78,110); *Joseph Collier*, Judge.

Action by Jacob H. Kraemer against the Indiana Union Traction Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

J. A. Van Osdol and *Kittinger & Diven*, for appellant.

Rucker & Rocap, for appellee.

IBACH, J.—In this action appellee recovered \$1,500 for personal injuries sustained when he was struck by appel-

lant's interurban car while he was walking across Massachusetts Avenue in Indianapolis. The only errors assigned arise under the motion for new trial. They are, that the verdict is not sustained by sufficient evidence in that the evidence shows contributory negligence on appellee's part; that the court erred in giving instructions Nos. 25, 26 and 27 embodying the doctrine of last clear chance; and in failing to give instruction No. 3 at appellant's request; and in permitting appellee to testify over appellant's objection to a conversation with appellant's claim agent.

The evidence shows that appellee started diagonally across Massachusetts Avenue at an alley crossing, during a heavy rain, and carrying an umbrella pulled down low over his head, that he looked to the northeast before starting across the street, and saw no car; that he could see at that time about 490 feet; that when he had walked about forty feet and was about two or three feet from the track, about six or seven feet from where he was struck, he glanced out from under the umbrella to the northeast up the track, and saw no car within a distance of thirty, forty or fifty feet; that when he had taken one or two steps on the track, he was struck by appellant's interurban car coming from the northeast, and was injured. There was testimony that the car was running at the rate of twenty miles an hour, other witnesses placed its speed as low as eight miles an hour; several witnesses testified that they did not hear any gong sounded, or signals given, others testified that the gong was sounded several times.

Appellee looked from two points in the direction from which the car was coming, but saw no car. Whether he was guilty of contributory negligence in failing to

1. look in that direction for an approaching car at other times and places before reaching the tracks of appellant, was wholly a question of fact for the jury, and
2. not one of law for the court. It must be remembered that he was also under a duty to look for cars in an

opposite direction, and to look out for wagons and other vehicles, some of which, according to the evidence, were in the vicinity at the time. It would scarcely be negligence to attempt to cross when no car was in sight for thirty, forty or fifty feet, for unless the car was coming at an unusual rate of speed, he could cross before the car. The physical facts are such that either the car must have been coming at a very high rate of speed, or it must have been in sight when appellee looked up the track. If it was in sight, and he looked and failed to see it, he is chargeable with what he should have seen. If the jury believed that the car was coming at an unusual rate of speed, we can not say as a matter of law that it was not justified in finding that appellee was not guilty of contributory negligence, for, from the usual rate of speed of cars in that locality, he may have been justified in believing that, since there was no car in sight when he looked, he was safe in crossing.

On the other hand, the jury may have found appellee guilty of negligence, and yet have found appellant liable under the doctrine of last clear chance. The motor-

3. man testified that he saw appellant as soon as he left the sidewalk, crossing the street diagonally, in a hard rain, with an umbrella pulled down over his head, and his back three-quarters turned to the car, that as soon as he saw him, he immediately put the brakes on the car, and stopped it as soon as he could. There was other testimony tending to contradict this, and the physical facts tend to show that if the motorman, as he testified, saw appellee from the time he left the sidewalk, he could have operated his car in such a manner as to avoid the collision. If the motorman saw appellee coming across the street in such a manner that a collision seemed imminent, giving no indications of stopping, but rather by his conduct and appearance indicating to a reasonably prudent man that he was wholly unaware and unconscious of the approach of the car, and

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the motorman saw that he was thereby closely approaching a place where he would be struck by the car, it became his duty to take all the measures to prevent a collision which a reasonably prudent man would take, and under the evidence and the issues, it was a question for the jury to determine whether the motorman used such measures. The doctrine of last clear chance was brought in issue by the complaint, and there was evidence to which it was applicable.

Instructions Nos. 25, 26 and 27 upon the doctrine of last clear chance are supported by the authorities cited below, and were properly given. Appellant's objections to

4. these instructions are met by what is said with reference to instruction No. 3, below. *Indianapolis St. R. Co. v. Schmidt* (1905), 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478; *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490, 77 N. E. 945; *Indianapolis Traction, etc., Co. v. Smith* (1906), 38 Ind. App. 160, 77 N. E. 1040; *Saylor v. Union Traction Co.* (1907), 40 Ind. App. 381, 81 N. E. 894; *Indianapolis Traction, etc., Co. v. Kidd* (1906), 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143, 10 Ann. Cas. 942; *Southern R. Co. v. Fine* (1904), 163 Ind. 617, 72 N. E. 589; *Indianapolis St. R. Co. v. Bolin* (1906), 39 Ind. App. 169, 78 N. E. 210; *Grass v. Ft. Wayne, etc., Traction Co.* (1908), 42 Ind. App. 395, 81 N. E. 514; *Indiana Union Traction Co. v. Meyers* (1911), 47 Ind. App. 646, 93 N. E. 888; *Southern Indiana R. Co. v. Drennen* (1909), 44 Ind. App. 14, 88 N. E. 724; *Evansville, etc., Traction Co. v. Spiegel* (1912), 49 Ind. App. 412, 94 N. E. 748, 97 N. E. 949; *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 96 N. E. 973, 98 N. E. 1091; *Evansville, etc., R. Co. v. Johnson* (1913), 54 Ind. App. 601, 97 N. E. 176; *Cleveland, etc., R. Co. v. VanLaningham* (1913), 52 Ind. App. 156, 97 N. E. 573; *Cleveland, etc., R. Co. v. Henson* (1913), 54 Ind. App. 349, 102 N. E. 399. Instruction No. 3 requested by appellant was properly refused. It would have told the jury that if appellee's negligence

continued up to the time of his injury, he could not recover, even if appellant was negligent. Such is not the law.

5. If appellee was negligent in getting into a place of danger from appellant's car and appellant's motorman saw him in such place of danger, and could have avoided or mitigated the danger by the use of reasonable means at his command, appellant was liable, even though appellee's negligence continued to the instant of his injury. Such negligence of appellee is not contributory negligence, for the active cause of the accident was not appellee's negligence, but the active or proximate cause was the negligence of appellant's motorman in failing to take proper precautions after he saw appellee in a place of danger. See *Indianapolis Traction, etc., Co. v. Croly, supra*, and other authorities cited above.

The court did not err in allowing appellee to testify that the reason he went to Anderson shortly after his injury, while he was suffering much pain, was that he had

6. been asked to go there by appellant's claim agent, who told him that the company might make a settlement. Appellant's attorneys, in attempting to minimize the effect of appellee's injuries, had brought out the fact that though he claimed riding on cars caused him great pain, yet he had made a trip to Anderson on the interurban road of appellant about a month after the accident. The court then allowed the testimony objected to to show the circumstances under which he went to Anderson, stating that he admitted the evidence not for the purpose of binding appellant in any way, but as a circumstance tending to show how he went to Anderson, and the circumstances under which he went. Appellant invited this testimony, and paved the way for it, and no error was committed in its admission.

No error appears, and the judgment is affirmed.

NOTE.—Reported in 102 N. E. 141. As to the duty to look and listen before crossing tracks of an electric road, see 15 L. R. A. (N. S.) 254; 23 L. R. A. (N. S.) 1224. As to whether wantonness or

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wilfulness, precluding defense of contributory negligence, may be predicated on the omission of a duty before the discovery of a person in peril on a railroad or street railway track, see 21 L. R. A. (N. S.) 427. See, also, under (1) 36 Cyc. 1626; (2) 36 Cyc. 1622; (3) 36 Cyc. 1565; (4) 36 Cyc. 1641; (5) 36 Cyc. 1567; (6) 16 Cyc. 1117, 1118.

KYGER v. STALLINGS.

[No. 8,102. Filed December 16, 1913.]

1. **APPEAL.—Defective Term Time Appeal.—Waiver of Defect.—Joinder in Error.**—Where, in attempting to perfect a term time appeal, appellant omits to name and procure the approval of the sureties on the appeal bond at the term of court at which judgment was rendered, such omission is ground for dismissal of the appeal; but, where appellee joins in error, such joinder operates as a waiver of the right to a dismissal. p. 198.
2. **APPEAL. — Review. — Harmless Error. — Leave to Amend Complaint.—Variance.**—In an action on a note alleged to have been executed to J. S., where defendant at the time the note was offered in evidence objected on the ground of variance, claiming that the note was executed to Joseph S., and plaintiff, assuming that the objection was well taken, procured leave to amend the complaint, but before making the amendment learned that the note was in fact payable to J. S. and, without amending the complaint, re-offered and read the note in evidence, there was no variance between the pleading and proof, and there was no error either in the granting of leave to amend or in plaintiff's failure to amend after leave granted. p. 199.
3. **BILLS AND NOTES.—Non Est Factum.—Evidence.—Sufficiency.**—In an action on a note, where defendant, who pleaded *non est factum*, admitted the execution of a note to plaintiff, but claimed that the note introduced at the trial was not the note she executed, and plaintiff testified without qualification that it was, and the evidence showed that the note defendant admitted signing was drawn by a banker, who testified that the note in evidence was prepared by him and signed by defendant, and defendant also identified the signature as her own, the execution of the note sued on was sufficiently established. p. 200.
4. **BILLS AND NOTES.—Validity.—Adultery.—Evidence.**—Although a note given in consideration of future illicit intercourse is void, where the evidence in an action on a note showed that plaintiff and defendant had lived together for a long time as common law

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husband and wife, each believing that the wife was legally divorced from her former husband until about the time the note was executed, and showed that the note was executed at a time when they were about to separate, in settlement of financial matters between them, it cannot be urged, in the absence of evidence that it was in consideration of future illicit intercourse, that the note was void as being a contract between persons living in adultery. p. 200.

5. **BILLS AND NOTES.—*Defenses.—Gifts.***—In an action against plaintiff's former common law wife on a note executed by her in settlement of their affairs at the time of separation, defendant could not assert that the note was executed in consideration of interests which plaintiff had in her property by virtue of gifts from her and that she had an equitable claim on the property thus acquired by plaintiff, since if gifts were made she could not revoke them, and the property thus transferred became the property of plaintiff as absolutely as if he had purchased it. p. 201.
6. **BILLS AND NOTES.—*Notes Between Husband and Wife.—Payment.—Resumption of Marital Relations.***—In an action against plaintiff's former common law wife on a note executed by her in settlement of their affairs at the time of separation, where there was evidence showing that the parties did not consider the note as paid by their subsequent resumption of the relation of husband and wife, and that the reconciliation took place at defendant's request, the decision for plaintiff was supported by the evidence, and was not contrary to law on the theory that under the evidence the note was paid as a matter of law by virtue of the reconciliation. p. 201.
7. **APPEAL.—*Review.—Ruling on Motion for New Trial.***—Where as a part of her motion for a new trial, on the ground that she had been surprised by the testimony of a certain witness, defendant submitted an affidavit that the witness, who had testified to hearing a conversation by defendant, had since the trial told her that she was not the woman he heard, and in opposition thereto, plaintiff produced the affidavit of the witness in which he stated that since the trial defendant had tried to induce him to say that he had never seen her before the trial, but that he did see her and did hear the conversation to which he had testified, and that defendant's affidavit was false, the motion was properly refused upon that ground. p. 202.
8. **NEW TRIAL.—*Grounds.—Surprise.***—Surprise at the testimony of an adversary witness, legally admissible under the issues, is at most but ground for a continuance, and not cause for a new trial. p. 202.

From Knox Circuit Court; *Orlando H. Cobb*, Judge.

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Action by Joseph S. Stallings against Catherine P. Kyger. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

S. J. Ghee and *S. M. Emison*, for appellant.

John W. McGaughey, *W. M. Alsop* and *LeRoy M. Wade*, for appellee.

IBACH, J.—This was a term time appeal. At the term of court when the motion for new trial was overruled, an appeal was granted, the court fixed the penalty of 1. the appeal bond, and gave thirty days' time to file the same with surety to the approval of the court, but did not name or approve the sureties on the bond at the time. Within the time allowed by the court, but at its next term, the bond was filed and approved. Appellee has moved the dismissal of the appeal for the reason that the sureties were not named and approved during the term at which judgment was rendered, claiming that failure to do so is an omission of one of the necessary steps prescribed by statute for the perfecting of a term time appeal. Appellee's position is upheld by the case of *Penn, etc., Plate Glass Co. v. Poling* (1913), 52 Ind. App. 492, 100 N. E. 83, and cases there cited, and under that authority the appeal would have to be dismissed, were it not for the fact that appellee joined in error. Under the decision in *Cleveland, etc., R. Co. v. Smith* (1912), 177 Ind. 524, 97 N. E. 164, an appearance to the merits, if not withdrawn upon leave of court, or a joinder in error is a waiver of the right to dismiss an appeal "because of lack of the statutory notice required in a vacation appeal, or because of appellant's failure to comply with the statutory requirements of a term time appeal, which are designed to subserve the same purpose as the notice required in a vacation appeal." Therefore, appellee, by his joinder in error, must be held to have waived the right to dismiss the appeal for failure to name and approve the sureties on the bond at the time when

judgment was rendered, and his motion to dismiss must be overruled.

Joseph S. Stallings, appellee, brought this action on a promissory note for \$1,200, executed by appellant under the name of Catherine P. Stallings, to appellee under

2. the name of J. S. Stallings, and recovered below. The

errors assigned for reversal arise upon the court's action in overruling appellant's motion for new trial. It is contended that there was a variance between the pleadings and the proof, since the complaint and exhibit show the note sued on to have been executed to J. S. Stallings, and the original note was executed to Joseph S. Stallings. In this, counsel for appellant are in error, for the note proved at the trial was executed to J. S. Stallings. When the note was first offered in evidence, counsel for appellant objected on the ground of variance as above stated. Apparently of the opinion that there was a variance, appellee's counsel did not then read the note in evidence, but asked leave to amend his complaint, which was granted. Meanwhile another witness proceeded to testify, and then, doubtless after appellee's counsel had ascertained that there was no variance, and had found that the note corresponded with the complaint and exhibit, the note was again offered and read in evidence, and no amendment of the complaint was made. There was no error in the court's granting leave to amend, for it is largely in the discretion of the trial court to allow amendment of pleadings to conform to proof. It would be absurd to say, that, because he had obtained leave, appellee was under a duty to amend, and was in fault for failing to amend, when inspection showed an exact correspondence between the complaint and the proof. However, the action of the court in granting leave to amend, in no wise harmed appellant, and was absolutely immaterial. It certainly can not be said to be reversible error.

One paragraph of appellant's answer was a verified *non est factum*. Appellant at the trial admitted that she had

executed a note for \$1,200 to appellee. She claimed
3. that the note read in evidence was not the original note which she had signed. It is now urged, that, since there was a plea of *non est factum*, the execution of the note was not proved by sufficient evidence. In this we can not agree. Appellee testified without qualification, that appellant executed the note in evidence. The evidence showed that the note which appellant admitted to have signed, was drawn up by the cashier of a certain bank. This cashier was a witness and testified that the note in evidence was all in his handwriting except the signature, and identified that as appellant's. Appellant also identified the signature as hers.

It is also claimed that the note was void because it was a contract between parties living in adultery. The evidence shows that appellee and appellant had been living
4. together as common law husband and wife for several years, and that appellant was not divorced from her former husband, a Mr. Kyger, at the time the note was executed. It appears that appellee and appellant had entered into what they believed was a *bona fide* common law marriage. Appellant at the time she began living with appellee believed that her former husband had secured a divorce from her. Appellee believed the same for several years, until he found out at about the time that the note was given that she was not divorced, and it seems that appellant had lived with him for some time before she learned that she was not divorced. The note was executed at a time when appellant and appellee were about to separate, in a financial settlement between them as to their rights in property to which they jointly held title. There is some evidence that Stallings from his earnings had invested in this property an amount practically as large as the sum called for by the note. Other evidence would show that the property had been purchased with the proceeds of oil

lands which had been owned by Mrs. Kyger. It was clearly shown that, either in recognition of Stallings' services in aiding her in a lawsuit to regain possession of these oil lands, after she had been led to deed them away, or for some other good reason, she had transferred to him half the royalties from them. Appellant's evidence would tend to show that the note was executed under some compulsion from appellee, and that appellee's interest in the joint property was the result of gifts from her. Her evidence on both these points is contradicted. Though the evidence is conflicting, there is sufficient evidence to show that the note was given in settlement of the financial matters between the parties. There is absolutely no evidence to show that it was given in consideration of future illicit intercourse, in which case it would have been void as a matter of law.

Nor can the contention be upheld that as appellant
5. had made gifts to appellee, she had an equitable claim on the property thus acquired. As a matter of law, if she had executed gifts to appellee, she could not revoke them, and the property thus transferred to him became his as absolutely as if he had purchased it.

Appellant also claims that there is no proof to show that the note was not fully paid and satisfied by the action of
the parties in resuming the relations of husband and
6. wife after its execution, and claims that as a matter of law it was fully paid by their resumption of marital relations. There is evidence, however, that the parties did not consider the note paid by their reunion, and that this reconciliation took place at appellant's suggestion. Appellant cites no authority to support her claim that the note as a matter of law was paid by the resumption of their former relations. There is evidence to support the court's decision, and that decision is not contrary to law.

Thomas Pry, a witness for appellee, testified that when he, as a hostler brought a horse from a livery stable for

appellee and appellant during their last period of living together, they came out of their house quarrelling, and he overheard her say to him, with an oath, "Yes, I owe that \$1,200 note, and I will not pay it to you till I get ready." Appellant assigned as one ground of her motion for new trial that she was surprised by this testimony. However, Pry was not the only witness who gave such evidence, for appellee testified to the same conversation. As a part of her motion for new trial, appellant made affidavit that since the trial the witness Pry had told her that she was not the woman he heard make the above remark to Stallings, and that he had never heard a conversation between her and Stallings. Appellee produced in opposition to her affidavit the affidavit of Pry wherein he certified that since the trial appellant had induced him, Pry, to visit her at her home, and tried to induce him to say that he had never seen her before the trial, but that he, at that time, told appellant that he had seen her with Stallings, and heard the conversation with Stallings to which he testified at the trial. He also certifies that the statements in her affidavit as to what he had told her since the trial were false. Appellant made no showing by affidavits of any other evidence which would contradict Pry's statements in his affidavit or his testimony at the former trial. The court had before it the evidence which would have been produced at a new trial, and was clearly right, upon the showing made by these affidavits, in refusing to grant a new trial upon the ground of surprise at the testimony of the witness Pry. Furthermore, the testimony of the witness Pry was entirely legitimate under the issues, and therefore appellant could not have been legally surprised when the evidence complained of was introduced. Surprise at the testimony of an adversary witness, legally admissible under the issues, is at most but ground for a continuance, not for a new trial. *Fudge v. Marquell* (1905), 164 Ind. 447, 72 N. E. 565, 73 N. E. 895;

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Working v. Garn (1897), 148 Ind. 546, 551; 47 N. E. 951;
Kelley v. Kelley (1894), 8 Ind. App. 606, 34 N. E. 1009

No error appears and the judgment is affirmed.

NOTE.—Reported in 103 N. E. 674. As to effect of illegal consideration for contract, see 117 Am. St. 493. As to rights of parties to illegal contract, see 67 Am. Dec. 153; 113 Am. St. 724. As to separation agreements between husband and wife, see 90 Am. Dec. 367; 83 Am. St. 859. See, also, under (1) 2 Cyc. 191; (3) 8 Cyc. 282; (4) 7 Cyc. 743; (5) 20 Cyc. 1212, 1216; (8) 29 Cyc. 866.

KRUSE ET AL. v. STATE OF INDIANA, EX REL. THE CASPARIS STONE COMPANY.

[No. 8,113. Filed December 16, 1913.]

1. JUDGMENT.—*Default.—Setting Aside.*—Where a cause, though not at issue, was set for trial on a definite date by agreement of the parties duly entered of record, the defendants by failing to appear in court at the time named were subject to default, and where it appeared that after defendants were defaulted the court treated the complaint as denied, heard the evidence, made a finding and rendered judgment accordingly, defendants were not entitled to have the judgment set aside on the ground that they had not been ruled to answer, and that a party is not entitled to default his adversary and take judgment against him for want of a pleading without first taking a rule against him requiring such pleading. p. 206.
2. APPEAL.—*Weight of Evidence.—Affidavits on Motion to Set Aside Default.*—Affidavits and counter-affidavits on a motion to set aside a judgment taken by default partake of the nature of depositions and parol testimony, and not of the nature of documentary evidence, and are within the rule against weighing the evidence on appeal, hence, on appeal, a judgment overruling such a motion, supported by counter-affidavits against the motion, will not be disturbed on the evidence. p. 207.
3. JUDGMENT.—*Default.—Motion to Set Aside.—Discretion of Court.*—Trial courts have discretionary power in passing on motions to set aside defaults and judgments, and their rulings on such motions will not be disturbed on appeal unless the record discloses an abuse of such discretion. p. 208.

From Superior Court of Tippecanoe County; *Henry H. Vinton*, Judge.

Kruse v. State, ex rel.—55 Ind. App. 203.

Action by the State of Indiana, on the relation of The Casparis Stone Company, against Fred D. Kruse and others. From a judgment overruling defendants' motion to set aside the default and judgment rendered, the defendants appeal. *Affirmed.*

George P. Haywood and Charles A. Burnett, for appellants.

Thompson & McAdams, for appellee.

FELT, J.—This is an appeal from a judgment against appellants overruling their motion to set aside a judgment taken against them on default. The only error assigned is that "The court erred in overruling appellants' motion to set aside the default and judgment rendered in said cause on the 30th day of January, 1911." The original judgment was against Fred D. Kruse and his bondsmen, the other appellants, on a contractor's bond for an alleged breach in failing to pay for certain stone used by said Kruse in the performance of a contract with the Board of Commissioners of White County, Indiana. The examination of appellant, Fred D. Kruse, was taken out of court by appellee and duly filed and published. The appellants appeared in the White Circuit Court and filed affidavits for change of venue from the judge and from the county. The motion for change of venue from the county was sustained and the venue was changed to the Superior Court of Tippecanoe County. Of date, May 12, 1910, the record of that court, in this cause, contains the following entry: "Come the parties by their attorneys and by agreement of the parties on docket call the court sets this cause for trial by the court on June 10, 1910, and day is given." From some cause not apparent from the record, the case was not tried at that time and on January 9, 1911, the record shows the following entry: "Come the parties by their attorneys and on motion and by agreement of the parties the court sets this cause for trial by the court on January 30, 1911, and

day is given.” On January 30, 1911, the record shows that the appellants failed to appear either in person or by “R. J. Million and Reynolds and Sills, their attorneys”, and that a default was duly taken against them. After the entry showing the default is the following: “This cause is now submitted to the court for hearing and decision upon the pleadings filed, default herein above entered, and upon oral and documentary evidence. And the court having heard and examined the evidence and being fully advised and satisfied in the premises, does now find for the plaintiff and that there is due plaintiff from said defendants the sum of \$1,026.62 and costs of this action.” Judgment was duly rendered on the finding and on the same day it was assigned to Jacob D. Timmons *et al.* On March 11, 1911, appellants by Haywood & Burnett, their attorneys, filed their verified motion to set aside the default taken against them through their mistake, inadvertence, surprise and excusable neglect, and also for the reason that the judgment was taken for \$26.62 in excess of the amount demanded in the complaint. On March 29, 1911, appellee, by its attorneys, filed a remittitur of that part of the judgment in excess of \$1,000 and all accrued interest on such excess, as of the date the judgment was rendered.

The motion to set aside the default is long but in substance charges that the defendants had employed R. J. Million, an attorney of White County, to represent them in securing the change of venue and to defend them in the suit; that the defendant, Fred D. Kruse, had a conversation over the long distance telephone with E. B. Sellers, the attorney for the plaintiff in the suit, on Saturday, January 28, 1911, in which he asked that the trial be postponed on account of sickness in his family and that he was informed by said Sellers that he did not think the case would be tried on that day for the reason that he expected counsel in a kindred case set for trial on the same day, would secure a continuance which would postpone the trial of

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both cases; that there was no breach of the bond sued on in this case and nothing was due thereon but there was a breach of the bond sued on in the other case; that no rule to answer the complaint was taken against the defendants, or either of them,

The motion was resisted and counter-affidavits of Emery B. Sellers and R. J. Million were filed. In substance the affidavit of Sellers denies that he in any way led the defendants to believe that the case would not be tried on the day named, and asserts that both in said telephone conversation on January 28 and by letters written on January 17 and January 28 he had informed defendant Kruse, the case would in all probability be tried on January 30; that he had also communicated with R. J. Million, attorney for defendants, who knew the case was set for trial on January 30. The affidavit of R. J. Million shows that he had been the attorney for the defendants and that on January 20, he wrote Fred D. Kruse and mailed the letter at Monticello, Indiana, to his home in Fort Wayne, Indiana, and informed him that the case was set for trial on January 30 at Lafayette, Indiana, and that he would not attend the trial unless his fee for services was paid to him in advance of the trial and requested him to advise him by return mail; that he did not write him until January 28 when without paying or offering to pay him any part of his fee or expenses, he requested him to go to Lafayette on January 30 and secure a continuance of the trial.

It is contended by appellants that since they had entered an appearance in the case, no default could be properly taken against them until after they had been ruled

1. to answer and that this had not been done. The

record in this case does not show that appellants were defaulted and judgment taken against them for want of an answer. The case was set for trial on a definite date by agreement duly entered of record. By this agreement, the parties were bound to appear in court at the time named

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and upon failure so to do were subject to default for such failure. In court procedure, a default is taken against a party for failure to do something required of him. The judgment shows that the court, after the appellants were defaulted, treated the complaint as denied, heard the evidence, made a finding and rendered its judgment in accordance therewith. The cases cited by appellants to the effect that a party is not entitled to default his adversary and take judgment against him for want of a pleading without first taking a rule against him requiring such pleading, are not in point in this case. There are decisions to the effect that a party who goes to trial without requiring the issues to be completed, will be regarded as having waived his right to enforce a rule against the other party to file pleadings and the case may be tried as though the complaint or affirmative answer were controverted by a general denial. The appellants by their agreement, have placed themselves in the position of one who goes to trial without requiring the issues to be completed. As the court heard the evidence and proceeded as though the averments of the complaint were denied, appellants are not in a position to complain that they were defaulted for failure to appear in accordance with their agreement. *Buchanan v. Berkshire Life Ins. Co.* (1884), 96 Ind. 510, 516; *Young v. Gentis* (1893), 7 Ind. App. 199, 202, 32 N. E. 786; *Crum v. Yundt* (1895), 12 Ind. App. 308, 309, 40 N. E. 79; *Havens v. Gard* (1892), 131 Ind. 522, 523, 31 N. E. 354; *Farmers Loan, etc., Co. v. Canada, etc., R. Co.* (1891), 127 Ind. 250, 254, 26 N. E. 784, 11 L. R. A. 740; *Hartlep v. Cole* (1885), 101 Ind. 458.

The motion to set aside the default and judgment and the counter-affidavits, presented an issue of fact which was determined by the trial court adversely to appellants.

2. It has been held that such affidavits partake of the nature of depositions and parol testimony and not of the nature of documentary evidence, and that the rule

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applicable to parol testimony applies on appeal. *Masten v. Indiana Car, etc., Co.* (1900), 25 Ind. App. 175, 180, 57 N. E. 148. The decision of the trial court will not be disturbed on appeal, where there is evidence to sustain it and in this case, there is evidence to sustain it. Trial courts have discretionary power in passing on motions to

3. set aside defaults and judgments, and unless the record shows an abuse of this legal discretion, courts of appellate jurisdiction will not disturb the judgment of the lower court. *Milbourn v. Baugher* (1909), 43 Ind. App. 35, 42, 86 N. E. 874; *Matson v. Indiana Car, etc., Co., supra*, 184. On the facts of this case, we cannot say there was any abuse of the court's discretionary power in refusing to set aside the default. No reversible error is shown by the record.

Judgment affirmed.

NOTE.—Reported in 103 N. E. 663. See, also, under (1) 23 Cyc. 742, 744; (2) 3 Cyc. 366, 378; (3) 3 Cyc. 341; 23 Cyc. 895.

**WULSCHNER-STEWART MUSIC COMPANY v.
FAULKNER.**

[No. 8,104. Filed December 17, 1913.]

1. **CONVERSION.—Actions.—Evidence.—Sufficiency.**—In an action for the conversion of a piano, evidence showing that the piano was purchased by plaintiff when his daughter was a schoolgirl, that after her marriage plaintiff made his home with her most of the time and that she continued to use the piano, that in the absence of plaintiff she traded the piano to defendant for a player piano, that plaintiff had never parted with the title to his daughter or to any one else, that at the time of the trade defendant's agent was informed the piano belonged to plaintiff, that plaintiff never acquiesced in or consented to the trade, and after demand, sued for the conversion of the piano, which defendant in the meantime had sold, was sufficient to support a verdict and finding for plaintiff. p. 210.
2. **EVIDENCE.—Opinion of Nonexpert.—Value.—Competency.**—In an action for damages for the conversion of a piano, plaintiff, who

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had previously testified as to his familiarity with the piano in question and that he knew what pianos of the same kind and condition would sell for, was sufficiently qualified to testify to the value of the piano at the time of the conversion, and the fact that he was not acquainted specially with pianos was a circumstance going only to the weight of his testimony. p.211.

3. EVIDENCE.—*Admissibility.—Value of Property.*—In an action for damages for the conversion of a piano which defendant had taken in trade for a more valuable instrument, the amount allowed for the piano in suit as credit on the new instrument was admissible in evidence on the question of value, though the fact that such credit was allowed on the purchase price of a more valuable instrument could properly be considered as bearing on the weight of such evidence. p.211.
4. APPEAL.—*Review.—Harmless Error.—Instructions.*—The giving of an instruction that evidence of contradictory statements is not evidence of the truth or falsity of such statements but merely affects the credibility of the witness, objected to on the ground that where a party himself testifies contradictory statements made by him out of court may sometimes be proof of the facts involved in the statements, was not misleading or harmful, where the only contradictory statements introduced were those of plaintiff's witness, and not himself. p.212.
5. CONVERSION.—*Evidence.—Damages.*—In an action for damages for the conversion of a piano, where the evidence as to the value of the piano was conflicting and ranged from \$75 to \$200, the court cannot say as a matter of law that a verdict for \$150 was excessive. p.212.

From Superior Court of Marion County (82,704) ; *Charles J. Orbison*, Judge.

Action by Edguer Faulkner against the Wulschner-Stewart Music Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Frank C. Groninger and *Taylor E. Groninger*, for appellant.

Bailey & Young, for appellee.

IBACH, J.—This was an action by appellee against appellant for damages for conversion of a piano, in which appellee recovered \$150. It is alleged that the court erred in overruling appellant's motion for new trial.

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The first ground of this motion was that the verdict is not sustained by sufficient evidence. The following facts are undisputed: Appellee in 1902 or 1903 bought 1. from appellant the piano in question for \$240. Appellee did not play the instrument, but his daughter, then a schoolgirl, learned to play and used the piano. Subsequently she was married, and continued to use the piano, her father living most of the time with her and her husband. In May, 1910, in the absence of her father, she and her husband traded the piano to appellant on a player piano at the price of \$650, and were allowed on the purchase price of the player piano, \$200 for the old piano. In January, 1911, after default had been made in the payments on the player piano, and appellant had taken it back into its possession, appellee, after demand, brought this action for conversion of the old piano, which appellant in the meantime had sold. Appellee testified that the piano was his; that he had never parted with title to his daughter, or to any other person; that he was not at home when the trade was made and had no knowledge of it; that he had never consented to or acquiesced in the trade. His daughter testified that she told appellant's salesman at the time of the trade that the piano was her father's, and he said that was all right, as it was in the family. The salesman testified that she said the piano was hers. Appellant's defense proceeded upon the theories that appellee had either given the piano to his daughter, or he had ratified and acquiesced in the trade, had not brought suit for more than six months, and was estopped to assert title. But according to appellee's testimony, instead of acquiescing in the trade, he, shortly after the player piano was brought into his house, went to consult a lawyer about the recovery of his piano, but brought no action at the time because he did not have the money to pay the fee demanded by the lawyer. It is sufficient to say that the jury was fully and ably instructed

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on the law applicable to appellant's defenses, but it found that the facts did not support either of these theories. There is evidence to support the verdict and finding in favor of appellee.

It is also urged that the court erred in allowing appellee to answer the question, "What was the piano worth during the spring and summer of last year?" Appellant

2. objected on the ground that the plaintiff was not shown to be qualified to testify on this point. The court overruled the objection and appellee answered "\$200". A nonexpert witness who has actual knowledge of the very thing whose value is in controversy, and it is a thing in common use, or concerning which every person is of necessity compelled to have some knowledge, may give his opinion as to value, even if he does not know the market price. *Grave v. Pemberton* (1891), 3 Ind. App. 71, 29 N. E. 177; *Storms v. Lemon* (1893), 7 Ind. App. 435, 34 N. E. 644; *Burke v. Howell* (1896), 14 Ind. App. 296, 298, 42 N. E. 952. Appellee had previously testified as to his familiarity with the piano in question, and stated that he knew what would be asked for secondhand pianos, if he went to buy one, also what pianos in the same condition as his would sell for in Indianapolis. It seems to us that this was enough of a showing of knowledge of value of the piano in question to allow him to testify as he did. That he was a nonexpert, not acquainted specially with pianos, was a circumstance which would go to the weight of his evidence.

It is also insisted that the court erred in allowing defendant's witness Udell to testify on cross-examination that defendant allowed \$200 for the piano on the pur-

3. chase price of a player piano at \$650, over defendant's objection that if something was allowed as a credit, it would not be a valuation of the piano that was fair. No authority is cited to sustain this position. It may be true that appellant allowed more than it would

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have paid in cash, yet it was a valuation of some kind placed upon the piano by appellant at the time it was converted, that would at least tend to show its market value, and was eminently proper to go to the jury. The fact that the price of \$200 allowed was on the purchase price of an instrument of greater value would be proper to consider in determining the weight to be given this evidence, but did not affect its admissibility.

The court instructed the jury that evidence had been introduced attempting to show statements made by a witness in the cause, out of court, contradictory to statements

4. made by that witness at the trial; that proof of such statements is not evidence of the truth or falsity of the facts involved in such statements, but such evidence had been admitted solely for the purpose of affecting the credibility of the witness. The objection is made that where a party is himself a witness, contradictory statements made by him out of court may under some circumstances be proof of the facts involved in the statements. However, the witness to whom the court referred, the only one who is shown to have made contradictory statements out of court, was the plaintiff's daughter, not a party to the action, and therefore the instruction was not erroneous, and could not have misled the jury.

Lastly, it is urged that the damages awarded were excessive. Appellant's witnesses valued the piano at \$75 to \$100, and stated that they had allowed \$200 on the price

5. of the player piano, had put repairs on the old piano amounting to perhaps \$60, and had sold it for \$155. Appellee's witnesses valued it at \$175 to \$200. Thus there was competent evidence tending to show that the piano was worth as much as was allowed for damages, and the jury seems to have fairly reconciled the conflicting evidence. We can not say as a matter of law that the damages were exces-

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sive, nor that they were unsupported by the evidence, therefore the verdict must stand.

No error appears. The judgment is affirmed.

NOTE.—Reported in 103 N. E. 665. As to damages for conversion of personalty, see 24 Am. Dec. 70; 54 Am. Rep. 421. See, also, under (1) 38 Cyc. 2085; (2) 17 Cyc. 113, 116; (3) 38 Cyc. 2083; (4) 38 Cyc. 1732; (5) 3 Cyc. 380, 381.

**SOUTHERN EXPRESS COMPANY ET AL. v. SCHURZ
ET AL.**

[No. 8,630. Filed December 17, 1913.]

1. **APPEAL.—Questions Reviewable.—Admission of Evidence.—Briefs.**—No question is presented on alleged error in the admission in evidence of certain exhibits and in refusing to strike out certain depositions, where appellants' brief fails to disclose in the statement of the record that the court ever ruled on the motion to strike out, or that any exception was reserved, and fails to set out the exhibits with sufficient certainty to enable the court to say whether their admission was harmful, or to set out the nature of the objection made in the trial court. p. 214.
2. **APPEAL.—Record.—Duty to Show Error.**—The court on appeal will not search the record to find grounds for reversal, but it is the duty of appellant to so prepare the briefs that the judges who do not have the record may familiarize themselves with the merits of the questions without resort to the record. p. 214.
3. **APPEAL.—Questions Presented for Review.—Motion for New Trial.**—No question is presented for review on appeal on the overruling of a motion assigning as causes for new trial "that the finding and judgment of the court is not sustained by sufficient evidence," and "that the finding and judgment of the court is contrary to law." p. 215.

From Dubois Circuit Court; *John L. Bretz*, Judge.

Action by Jacob E. Schurz and another against the Southern Express Company and another. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

Richard M. Milburn and *Bomar Traylor*, for appellants.
Leo H. Fischer, for appellees.

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LAIRY, C. J.—Appellees brought this action against appellants as common carriers, to recover damages for the loss of certain furs shipped by express from Huntingburg, Indiana, to Detroit, Michigan. The complaint was in two paragraphs to each of which there was an answer in general denial. The issues thus formed were tried by the court without the intervention of a jury, and resulted in a finding for appellees in the sum of \$313.37. Appellants filed separate motions for a new trial which motions were overruled and judgment rendered.

The only error assigned on appeal is the action of the trial court in overruling each of appellants' motions for a new trial. Under this assignment, appellants insist that there were erroneous rulings of the trial court relating to the admission of certain evidence over their objections, that the finding is not sustained by sufficient evidence and that the finding and judgment are contrary to law.

The statement of the record set out by appellants in their brief is wholly insufficient to present any question in regard to the court's ruling upon the admissibility of evidence. It is well settled that this court will not search the record to find grounds for reversal. Appellants claim that the trial court erred in admitting in evidence, certain exhibits and in refusing to strike out certain depositions offered in evidence. It is not shown that the court ever ruled on the motion to strike out the depositions or that any exception was reserved. The exhibits to which objections were made are not set out in the brief and their substance is not set out with sufficient certainty to enable the court to say whether they were harmful in character, and the nature of the objection made in the trial court is not set out in the brief. It is impossible for the court to determine the nature of the questions thus sought to be presented without resort to the record. The Supreme Court of this State has thus construed the rule: "Rule 22 of this court is plain, and the purpose of the court

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to enforce it to the extent that it shall be necessary to cause briefs to be prepared in such a way that the judges who do not have the record may familiarize themselves from the briefs with the merits of the questions presented has been often indicated.” *M. S. Huey Co. v. Johnston* (1905), 164 Ind. 489, 73 N. E. 996.

The statement of the record in appellants’ brief contains a condensed recital of the evidence in narrative form and

we are asked to determine whether the decision of

3. the court is sustained by sufficient evidence or is contrary to law. If this question was properly presented to the trial court by a motion for a new trial, it is properly presented here. The first and second causes assigned for a new trial are as follows: “(1) That the finding and judgment of the court is not sustained by sufficient evidence; (2) that the finding and judgment of the court is contrary to law.” The Supreme Court has repeatedly held that causes for a new trial in the language of those contained in appellants’ motion are unauthorized and are insufficient to present any question. *Lynch v. Milwaukee Harvester Co.* (1903), 159 Ind. 675, 65 N. E. 1025; *Gates v. Baltimore, etc., R. Co.* (1900), 154 Ind. 338, 56 N. E. 722; *Migatz v. Stieglitz* (1906), 166 Ind. 361, 77 N. E. 400. In the case first cited the court said: “The statute, in plain language, names the causes which may be assigned for a new trial. It may be that, upon verdicts or findings in strict accord with the law and evidence, judgments contrary to the law and evidence are rendered. But the remedy against such errors is a motion to modify the judgment, and not a motion for a new trial.” We are not at liberty to depart from the construction placed upon this statute by the Supreme Court.

Appellants have failed to point out any error in the record, and the judgment must be affirmed.

NOTE.—Reported in 103 N. E. 667. See, also, under (1) 2 Cyc. 1013; (2) 2 Cyc. 1014; (3) 2 Cyc. 992, 998.

VIRGIN v. THE LAKE ERIE AND WESTERN RAILROAD
COMPANY ET AL.

[No. 7,886. Filed April 18, 1913. Rehearing denied June 25, 1913.
Transfer denied December 18, 1913.]

1. TRIAL.—*Instructions*.—Instructions should correctly inform the jury as to the law applicable to the case, and leave the jury free to determine the facts from the evidence on all questions where the evidence is conflicting, or where the facts, though undisputed, are of such character that reasonable minds might draw different conclusions therefrom. p. 221.
2. RAILROADS.—*Highway Crossings*.—*Rights of Persons on Highway*.—The rights of a railroad company whose tracks are lawfully on or across a public highway, and of a person lawfully using such highway, are equal, except that the railroad company has the prior right where both desire to use the highway at the same time and place; but the company's right of precedence is dependent upon its giving due notice of the approach of its train. p. 222.
3. RAILROADS.—*Crossing Accidents*.—*Grade Crossings*.—*Ordinary Care*.—Since a railroad crossing at grade is a known place of danger, one approaching same and attempting to cross must use such care and prudence, proportionate to the known danger, as an ordinarily prudent and cautious person would use under like circumstances and conditions, to avoid injury. p. 222.
4. RAILROADS.—*Crossing Accidents*.—*Presumptions*.—It will be presumed that one injured in attempting to cross a railroad track saw and heard that which he could have observed in the exercise or ordinary care. p. 222.
5. RAILROADS.—*Crossing Accidents*.—*Care Required in Approaching Crossing*.—*Ordinary Care*.—While one approaching and attempting to cross a railroad track must always use ordinary care under the circumstances existing at the time and place, he is not chargeable with a higher degree of care on account of any obstructions, wrongful conduct, or failure on the part of the company to discharge any duty incumbent upon it; and where a railroad company by obstructions, or other negligent acts or omissions, makes a crossing more hazardous to persons desiring to use the highway, it must use such care and give such warnings of the approach of trains as are commensurate with such increased hazard. p. 223.
6. RAILROADS.—*Crossing Accidents*.—*Looking and Listening*.—The law cannot arbitrarily determine the place or distance from the track, where one approaching a crossing must look and listen, but

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the sufficiency of precautions taken in a given case must be determined from a consideration of whether, under the particular circumstances, the person approaching the track exercised ordinary care in selecting the place and in looking and listening. p. 224.

7. **RAILROADS.—Crossing Accidents.—Contributory Negligence.—Determination.—Acts or Omissions of Company.**—Obstructions placed by a railroad company on its tracks, its failure to signal the approach of its train to a crossing, or to perform any other duty it owes to a person lawfully on the highway, are often important elements to be considered in determining the question of contributory negligence. p. 224.
8. **RAILROADS.—Crossing Accidents.—Failure to Give Signals.—Rights of Person Approaching Crossing.**—While the failure of a railroad company to give warning of the approach of its train to a highway crossing does not relieve a traveler on the highway from the duty of exercising ordinary care in attempting to cross, he may, in the exercise of such care, rely upon the giving of the warnings required by law. p. 224.
9. **NEGLIGENCE.—Contributory Negligence.—Question of Law and Fact.**—The question of contributory negligence is usually a mixed question of law and fact; being a pure question of law only when the facts are undisputed and inferences deducible therefrom lead to but one conclusion, and a question of fact for the jury where the facts are controverted, or are such as are susceptible to different inferences by reasonable minds. p. 224.
10. **RAILROADS. — Crossing Accidents. — Ordinary Care. — Duty to Stop and Look and Listen.**—While a traveler on a public highway must always use ordinary care in attempting to pass over a railroad crossing, the question of whether he must stop before attempting to pass over it depends upon the facts of each particular case, and it cannot be said that in each case ordinary care requires that he should stop. p. 225.
11. **RAILROADS.—Operation.—Duty to Persons on Highway.**—The right of a railroad company to operate its trains is subject to the restrictions that it will use the care and prudence required by the law to avoid injuring persons lawfully upon the highway crossed by its tracks. p. 225.
12. **RAILROADS. — Crossing Accidents. — Conditions Misleading to Traveler.**—Where the conditions at a railroad crossing are indicative of unusual danger to one attempting to cross, such person must use care proportionate to the danger; but if the conditions are misleading and give to him a sense of security, when he is actually in danger, he is not held to that strict accountability applicable under ordinary conditions. p. 225.
13. **NEGLIGENCE.—Contributory Negligence.—Jury Question.**—When the question of negligence or contributory negligence is one of

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fact, or mixed law and fact, it is to be determined by the jury under proper instructions as to the law. p. 225.

14. **RAILROADS.—Crossing Accidents.—Contributory Negligence.—Instructions.**—In an action for injuries by being struck by a train at a highway crossing, an instruction on the question of contributory negligence, stating that if plaintiff could not see or hear the train without stopping, and he did not stop, look and listen, he was guilty of contributory negligence, regardless of any obstructions, or negligent omissions or conduct on the part of defendant, and one stating that if plaintiff could not, while his wagon was in motion, learn of the approach of the train, his failure to stop raises a presumption of contributory negligence authorizing a finding for defendants, were each erroneous in that they invaded the province of the jury. p. 226.
15. **RAILROADS.—Crossing Accidents.—Duty of Person Attempting to Cross.—Instructions.**—An instruction that plaintiff, who was injured by a train at a highway crossing, "should have stopped and placed himself in a position, if any such position was available, where he could have seen the train," as well as instructions from which the jury understood that plaintiff could not recover if he could have ascertained that a train was approaching, either by stopping his team or by leaving it and going ahead of it around and beyond an obstruction placed by defendant, were erroneous in that they went beyond the rule of ordinary care and invaded the province of the jury. p. 227.
16. **RAILROADS.—Crossing Accidents.—Failure to Sound Whistle.—Instructions.**—In an action for injuries from being struck by a train at a highway crossing, an instruction that if the station was less than eighty rods from the place of the accident, there was no law of the State requiring the sounding of the whistle between the station and the crossing where the accident occurred, was misleading, since the statutory requirements are not in every instance the full measure of the care required in the operation of trains, and the jury probably understood therefrom that defendant was not required to give any warning of the approach of the train to the crossing after it left the station. p. 228.
17. **RAILROADS.—Highway Crossings.—Duty to Restore.—Instructions.**—Under subd. 5, §5195 Burns 1908, §3903 R. S. 1881, a railroad company must restore a highway crossed by it to its former state where it is practical to do so, otherwise it must be restored so as not to unnecessarily impair its usefulness; and a railroad company, using planks in restoring a highway, cannot arbitrarily determine the width of such planked portion of the crossing, but is required to use the planks in such way and to such extent as to meet the requirements of the law; and, since by statute and the law independent of statute the right to interfere with a public

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highway carries the duty to use reasonable care and skill to make it as safe and serviceable as it was before it was disturbed, the question, in an action for injuries sustained at a railroad highway crossing, of whether defendant was negligent in the discharge of its duty in this respect was for the jury, and an instruction that defendant was not required to plank its crossing the full width of the highway was erroneous. p. 229.

18. *APPEAL.—Review.—Effect of Erroneous Instructions.—Answers to Interrogatories.*—In an action against a railroad company for injuries sustained at a highway crossing, where it is apparent from the record that many of the answers to interrogatories tending to show contributory negligence were in a measure influenced by error in instructions, such error must be deemed to have been prejudicial. p. 231.

From Benton Circuit Court; *James T. Saunderman*, Judge.

Action by Stanley Virgin, by his next friend Manford Virgin, against The Lake Erie and Western Railroad Company and another. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Addison C. Harris, Thompson & McAdams and *Fraser & Isham* for appellant.

John B. Cockrum, Stuart, Hammond & Simms and *E. G. Hall*, for appellees.

FELT, P. J.—This is a suit by appellant against appellees for damages for personal injuries alleged to have been received on account of the negligence of appellees. The jury returned a general verdict against appellant and with its answers to interrogatories. The court overruled appellant's motion for a new trial and rendered judgment on the verdict. The error assigned is the overruling of the motion.

The accident which is the basis of this suit occurred in the daytime on November 23, 1905, at what is called the "Blasdell Crossing" within the corporate limits of the town of Boswell, Indiana. Appellee railroad company's road consisted of three tracks running east and west through the town and intersecting the north and south streets thereof which were five in number and each sixty feet in width. The

town contained a population of about 1,000, and the railroad divided it near the center. Appellee company's depot is located on the south side of the tracks and in the fourth square west of the Blasdell road, and west of Clinton Street. The grain elevators mentioned in the evidence are located north of the tracks. The Blasdell road is the farthest street east in the town and runs north and south across the railroad. The other streets which cross the railroad are west of said road and in their order are named Harold, Center, Clinton and Adams. Main Street runs east and west through the town and is the first street south of the railroad. North Street runs in the same direction and is north of the railroad. The main track of appellee company's road is the one farthest south, the next is known as the passing track and the one farthest north is called the house track.

Appellant was a farm hand and on the day of his injury was hauling corn to one of said elevators. At the time, and just prior to the accident, all of said tracks were occupied by trains, four in number. A west bound freight train consisting of forty-one cars and a caboose, stood on the passing track with the engine west of Clinton Street and its caboose extended to the center of the Blasdell road and left eight feet of the crossing plank unobstructed. An east bound freight train was on the house track and its rear cars were west of Adams Street. The engines of these two trains overlapped. A west bound passenger train had entered and was standing on the passing track 400 feet east of the Blasdell road. The train which struck appellant was going east on the main track. After appellant had disposed of his load of corn, he returned to Adams Street which he had crossed going to the elevator, for the purpose of crossing the railroad and going to the farm south of the town from which he was hauling corn. Finding the track obstructed, he turned north, entered North Street and drove east along that street until he came to the Blasdell road

where he turned south for the purpose of crossing the railroad on that street in order to reach his destination. The evidence tends to show that the railroad was built through said town in 1871-1872; that a fill of about three and one-half feet was made across the Blasdell road upon which appellee's road was constructed; that the station is 1,024 feet west of said road and there is a down grade of about three and one-half feet from the station to said road; that the approaches to the crossing on said road were made by cutting ditches on the side of the road and placing the dirt in the center of the highway; that the approaches were about sixteen feet wide and in the center of the highway; at the tracks appellee had placed boards sixteen feet in length as a means of crossing the tracks. The evidence tends to show that there was no one at the Blasdell road to warn appellant; that his view was obstructed by the freight train, the cars of which were twelve or fourteen feet high; that the engine of the east bound passenger train was not laboring and the train approached with but little noise, down grade at a speed of about fifteen miles an hour; that no warning was sounded of its approach to the crossing; that there was a bump board on the west side of appellant's wagon, as he drove south, which extended above his head; that as he approached the tracks he took his position in the front part of the wagon, brought his team to a slow walk, stilled his wagon to aid him in hearing any sound that might indicate danger, looked to the west and listened but heard no signal or noise to indicate the approach of a train or any danger, kept his team under careful control, did not stop but drove around the end of the caboose onto the track and was struck and injured as alleged in his complaint.

The issues before the jury involved the question of appellee company's negligence, appellant's contributory negligence, and the proximate cause of the alleged injury.

1. In determining the correctness of instructions, we are to keep in mind the issues and the facts of the

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case as disclosed by the pleadings and evidence. The instructions given should correctly inform the jury as to the law applicable to the case and leave it free to determine the facts from the evidence, on all questions where there is a conflict in the evidence, or where the facts though undisputed are of such a character that reasonable minds might draw different conclusions therefrom.

It is a general rule of law that the rights of a railroad company whose tracks are lawfully on or across a public highway, and a person lawfully using such highway,

2. are equal except in the priority of right of the company in the use thereof when both desire to use the highway at the same time and place. *Lake Shore, etc., R. Co. v. Myers* (1912), 52 Ind. App. 59, 98 N. E. 654, 100 N. E. 313. The foregoing statement of the law presupposes that neither party is at fault. The right of precedence on the part of the company has been held to be dependent upon its giving due notice of the approach of its train to the crossing.

In *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697, 701, 88 N. E. 612, it is said: "The rights of the railroad company and the public to the use of highway crossings are equal, except that the company is entitled to precedence in passing upon giving due notice of its desire and purpose so to do." A railroad crossing at grade is

a known place of danger. The appellant in approach-

3. ing and attempting to cross appellee company's tracks was required to use ordinary care and prudence to avoid any accident or injury. The law pre-

4. sumes that he did see and hear that which he could so observe in the exercise of ordinary care for his own safety. Ordinary care is that care which an ordinarily prudent and cautious person would use under like circumstances and conditions to avoid injury, and such care is always proportionate to the known danger. *Cleveland, etc., R. Co. v. Federle* (1912), 50 Ind. App. 147, 98 N. E. 123 ;

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Cleveland, etc., R. Co. v. Houghland (1909), 44 Ind. App. 73, 83, 85 N. E. 369, 88 N. E. 623. If under all the circumstances existing at the time and place of the

5. accident, appellant used ordinary care in approaching and attempting to cross appellee company's tracks, he cannot be charged with any higher or different degree of care on account of any obstructions, wrongful conduct, or failure of the company to discharge any duty incumbent upon it under the circumstances. In other words, any fault or negligence of appellee company, cannot enlarge or change the rule of care as to appellant from that of ordinary care. On the other hand, if appellee company by obstructions or other negligent acts or omissions, made the crossing more hazardous to persons desiring to use the highway, it became and was its duty to use such care and to give such warnings of the approach of its trains to the crossing, as were commensurate with the increased hazard occasioned by such conditions or conduct. *Pittsburgh, etc., R. Co. v. Lynch* (1909), 43 Ind. App. 177, 181, 87 N. E. 40; *Cleveland, etc., R. Co. v. Federle, supra*; *Cleveland, etc., R. Co. v. Harrington* (1892), 131 Ind. 426, 433, 30 N. E. 37; *Chicago, etc., R. Co. v. Fretz* (1910), 173 Ind. 519, 526, 90 N. E. 76; *Cherry v. Louisiana, etc., R. Co.* (1908), 121 La. 471, 46 South. 596, 17 L. R. A. (N. S.) 505, 126 Am. St. 323. In *Cleveland, etc., R. Co. v. Miles* (1904), 162 Ind. 646, 651, 70 N. E. 895, it is said: "The running of locomotives and trains at a high rate of speed over street crossings in a city, even where the ordinary signals or the statutory warnings are given, may constitute negligence, and render the company liable for injuries occasioned thereby. * * * If the dangers of the situation require it, extraordinary precautions must be taken by the company to protect the public from injuries likely to occur at such crossing." On page 650 of the same opinion it is said: "The degree of care to be exercised by the company must be commensurate with the dangers of the particular

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situation created by its use of the street.” See, also, *Lake Shore, etc., R. Co. v. Myers* (1912), 52 Ind. App. 59, 98 N. E. 654, 656, 100 N. E. 313, and cases cited.

The law does not undertake to determine arbitrarily the place, or distance from the track, where one approaching a crossing must look and listen, but the test is, Did

6. he, under the particular circumstances, exercise ordinary care in selecting the place and in looking and listening for approaching trains? Obstructions

7. placed by a railway company on its tracks, its failure to give signals of the approach of a train to a crossing or to perform any other duty it owes to the person lawfully on the highway, may be, and frequently are, important elements to be considered in determining the question of contributory negligence. *Cleveland, etc., R. Co. v. Harrington, supra*; *Malott v. Hawkins* (1902), 159 Ind. 127, 135, 63 N. E. 309; *Pittsburgh, etc., R. Co. v. McNeil* (1904), 34 Ind. App. 310, 318, 69 N. E. 471; *Evansville, etc., R. Co. v. Berndt, supra*. While the failure to give

warning of the approach of a train, to a highway

8. crossing, does not relieve the traveler from the duty of exercising ordinary care, he may, nevertheless, while in the exercise of such care, rely upon the giving of the warnings required by the law, when a train is approaching a crossing. *Chicago, etc., R. Co. v. Ginther* (1911), 48 Ind. App. 12, 90 N. E. 911, and cases cited.

Contributory negligence, or the want of ordinary care, is usually a mixed question of law and fact. It is a question of law when the facts are undisputed and the infer-

9. ences to be drawn from them lead to but one conclusion. Where the facts are controverted or of

such a character that reasonable minds may draw different and contradictory inferences from them, the question is one of fact to be determined by the jury. *Diamond Block Coal Co. v. Cuthbertson* (1906), 166 Ind. 290, 306, 76 N. E. 1060. Whether a traveler must stop before attempting to pass over

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a railroad crossing, depends upon the facts of each particular case. He must always use ordinary care, but it cannot be said that such care requires him in every instance to stop before he attempts to cross. A railroad company has the right to operate its trains, but that right is subject to the restrictions that it will use the care and prudence required by law to avoid injuring persons who have the right to go upon the public highways crossed by the tracks of such company. *Nichols v. Baltimore, etc., R. Co.* (1904), 33 Ind. App. 229, 233, 70 N. E. 183, 71 N. E. 170; *Malott v. Hawkins, supra*; *Hoggatt v. Evansville, etc., R. Co.* (1892), 3 Ind. App. 437, 443, 29 N. E. 941; *Chicago, etc., R. Co. v. Fretz, supra*. If the conditions, from any cause, are of a character to indicate unusual danger in attempting to cross, the traveler must use care proportionate to such danger. If the facts and conditions are of a character to mislead one, about to pass such crossing and to give him a sense of security when he is in fact in danger, the law does not hold him to that strict accountability that it would under ordinary conditions, in the absence of such misleading facts, omissions or circumstances. *Indianapolis Union R. Co. v. Neubacher* (1896), 16 Ind. App. 21, 38, 43 N. E. 576, 44 N. E. 669; *Wabash R. Co. v. Biddle* (1901), 27 Ind. App. 161, 164, 59 N. E. 284, 60 N. E. 12; *Chicago, etc., R. Co. v. Fretz, supra*, 525, 532; *Chicago, etc., R. Co. v. Ginther, supra*, 19. Whenever the question of negligence or contributory negligence is one of fact or mixed law and fact, it is to be determined by the jury from the evidence, under proper instructions as to the law. *Chicago, etc., R. Co. v. Fretz, supra*, 526; *Evansville, etc., R. Co. v. Berndt, supra*. In the recent case of *Indiana Union Traction Co. v. Sullivan* (1913), 53 Ind. App. 239, 101 N. E. 401, Hottel, J., in discussing the question of the court's invasion of the province of the jury, said: "The

court may, however, assume certain facts within the issues and in support of which there was some evidence and where the facts so assumed to exist admit of but one inference, and that inference is one of negligence, the court may tell the jury that if they find such facts to be proven by the evidence, they may infer negligence.”

The particular questions presented by the briefs all relate to the instructions given by the court at appellee company's request. Among the instructions given are the following: (22). “If the jury find from the evidence in this case that on approaching the crossing in question said plaintiff could not on account of obstructions whatever they might have been, see or hear the train, or any portion of it, without stopping, looking and listening; and if the jury also find that if by stopping, looking and listening before entering upon the track and in time to avoid injury the plaintiff might have avoided the injury complained of, but that he did not so stop, look and listen, then the jury are instructed that he was guilty of contributory negligence, and if the jury so find, their verdict should be for the defendants.” 26. “That fact, if it is a fact shown in evidence, that the plaintiff did not, or could not, while his team and wagon were in motion, by the vigilant use of his eyes and ears, learn of the approach of said train; and if the jury also find from the evidence that before driving on the main track in front of the approaching train he did not stop, look and listen for such train, this raises a presumption of negligence against the plaintiff; and if the jury so find their verdict should be for the defendants.” Applying these rules of law to the foregoing instructions, we are to determine whether the court invaded the province of the jury on the question of contributory negligence. Instruction No. 22 told the jury, in substance, that if appellant could not see or hear the train without stopping, and he did not stop, look and listen, he was guilty of contributory negligence, regardless

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of any obstructions, or negligent omissions or conduct on the part of appellee company. The same error is found in instruction No. 26. It, in effect, tells the jury, that if appellant could not, while his wagon was in motion, learn of the approach of the train, his failure to stop raises a presumption of negligence against him and authorizes a finding for the defendants.

Instruction No. 25 given at the request of the appellee company goes beyond the rule of ordinary care and invades the province of the jury, by saying appellant “should
15. have stopped and placed himself in a position, if any such position was available, where he could have seen the train.” What was ordinary care under the conditions and surroundings, and whether appellant exercised such care, should have been submitted to the jurors for determination, without telling them in effect that, if it were possible to have learned of the approach of the train and he did not stop and take such precautions before attempting to cross, he could not recover. Instructions Nos. 24 and 27 asked by appellee company and given by the court, and possibly some others, are in general effect similar to those already discussed. Such instructions undoubtedly meant to the jury that appellant could not recover if it were possible for him to have ascertained that a train was approaching, either by stopping his team or by leaving it and going ahead of it to the track around and beyond the freight train, and that unless it was shown that he did take such precautions before he attempted to cross the track, he could not recover. In addition to showing the obstructions, the speed of the train and the absence of warnings, the evidence tends to show that appellant used some care in approaching and attempting to cross the tracks. He did not stop, and therefore under these instructions the jury was bound to find for appellee company, though the jury may have believed that a man of ordinary prudence, exercising ordinary care for his own safety, would have done just as appellant

did on this occasion. Appellant may have been guilty of contributory negligence, but it was for the jury to say what constituted ordinary care on his part. The court and not the jury by such instructions determines what is ordinary care. Ordinary care may or may not in this case have required appellant to stop, but on the facts of the case the court should not, in effect, have told the jury what was ordinary care on his part. The situation apparently suggested, or should have suggested, great care on the part of both appellant and appellee company. It is true that there is evidence both direct and circumstantial, tending to show that appellant was negligent, but this does not change the law. Other evidence also clearly tends to show that he used some care as he approached the crossing. There was no dispute about the location of the freight train and that it was more or less of an obstruction. That there was a dispute as to how completely his view was obstructed by it does not change the law applicable to the case, for it remains that, in any possible view, the facts were more or less controverted and of such a character that from them, men of equal intelligence and fairness might draw different and contradictory inferences. The jury and not the court should have determined whether ordinary care did or did not require appellant to stop and ascertain whether a train was approaching the crossing before he attempted to pass over. *Grand Trunk, etc., R. Co. v. Reynolds* (1911), 175 Ind. 161, 92 N. E. 733, 93 N. E. 850; *Evansville, etc., R. Co. v. Berndt, supra*, 701.

Instruction No. 6 given at the request of appellee company, told the jury that if the station at Boswell was less than eighty rods from the place of the accident,

16. "there was no law of the State of Indiana requiring the engineer * * * to sound the whistle on the locomotive of said train between said depot and said crossing where the accident occurred." As an abstract statement of law the instruction may be technically correct as

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it refers only to the sounding of the whistle. But it is in a sense misleading, for the statutory requirements are not in every instance, the full measure of the care required of a railroad company in operating its trains. The instruction does not refer to the requirements of the statute, but to those of the law generally. The distance from the station to the crossing where the collision occurred was a little over sixty rods and the jury would probably understand from the instruction that the company was not required to give any warning of the approach of the train to the crossing after it left the station. In view of the obstructions and the speed of the train, it was misleading and, as applied to the facts of this case, erroneous.

Instruction No. 7 and several others given at the request of appellee company are criticised by appellant as stating an erroneous rule in reference to the duty of the rail-

17. way company to restore the highway to the conditions existing prior to the construction of the railroad. The statute (subd. 5, §5195 Burns 1908, §3903 R. S. 1881) requires the company to "restore the * * * highway * * * to its former state, or in a sufficient manner not to unnecessarily impair its usefulness." Instruction No. 7 in substance told the jury the law does not require appellee company to plank the crossing in question to the full width of the street, if it was wider than the portion that was planked. This is not an accurate statement of appellee company's duty in respect to the highway. The statute does not require the use of plank, but it does require the road to be restored "to its former state" where it is practical so to do, and where it is not, then to restore it so as not to unnecessarily impair its usefulness. The idea clearly expressed by the statute is to permit railways to cross public highways, and to require the railway companies to restore such highways to their former state of usefulness as nearly as may be in a practical and reasonable sense consistent with the use to be made of both the railway and the highway.

If the company saw fit to use planks as a means of restoring the highway in question to such a state of usefulness, it was required to use them in such way and to such extent as to meet the requirements of the law. The width of such planked portion could not be arbitrarily determined by the company, nor would it in every case be required to plank, or otherwise make the highway suitable for travel to its full width. In many instances this would be impractical and unreasonable, but both by the statute, and the law independent of the statute, the right to interfere with a public highway is coupled with the duty to use reasonable care and skill to make it as safe and serviceable as it was before it was disturbed. The jury should have been instructed in accordance with the law applicable to such crossings, and then have been required to determine from the evidence, whether appellee had complied with the law in this particular instance. If it had, then no negligence could be charged against it on that account. If it had failed to discharge the duty imposed upon it by the law in this respect, and it was shown that appellant's injury was caused by such failure on its part, then appellee company would be liable therefor, the same as for any negligent act which was the proximate cause of an injury. The language employed in some of the decided cases would seem to indicate that the railway company is required to restore the highway to its former state and to the full width of the highway in every instance. Such statements may be correct as applied to particular cases, but not as a rule of general application. We think the statute, the general law relating to such crossings, and the decisions, when properly construed, authorize the conclusion above stated. *Evansville, etc., R. Co. v. Crist* (1889), 116 Ind. 446, 454, 19 N. E. 310, 2 L. R. A. 450, 9 Am. St. 865; *Evansville, etc., R. Co. v. Carvener* (1887), 113 Ind. 51, 52, 14 N. E. 738; *Evansville, etc., R. Co. v. Allen* (1905), 34 Ind. App. 636, 641, 73 N. E. 630; *Chicago, etc., R. Co. v. Leachman* (1903), 161 Ind. 512, 516, 69 N. E. 253; *Lake*

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Shore, etc., R. Co. v. McIntosh (1895), 140 Ind. 261, 277, 38 N. E. 476. We cannot consider in detail each of the instructions discussed in appellant's briefs, but what we have said, when applied to the several instructions is sufficient to indicate our view of the law applicable to the case.

It is also insisted by appellee company that, if it be conceded that there is error in the instructions, the answers to the interrogatories show that the appellant was not harmed by any instruction given. There are some answers that indicate appellant was negligent and others that indicate his attention was diverted by the presence of the other trains and that he looked and listened but could not see because of the obstructions. On the width of the highway, the answers are confusing and contradictory. It is apparent from a reading of the record that the answers to many of the interrogatories were influenced and in a measure determined by some of the erroneous instructions. In *Harmon v. Foran* (1911), 48 Ind. App. 262, 269, 94 N. E. 1050, 95 N. E. 597, this court said: "We cannot say that the jury was not influenced by this instruction in its consideration of the case, and that the answers returned to the interrogatories were not largely due to the effect which the instruction had upon the minds of the jurors, as the principal question to be determined in the case was whether the plaintiff was guilty of contributory negligence. If such instruction influenced the jury, and we conclude it did, the defendant was harmed and prejudiced thereby." The language quoted is applicable to several instructions and a number of the answers to interrogatories in this case. Here, as in that case, the principal question was that of contributory negligence. Other alleged errors need not be discussed, for reasons already stated in this opinion.

The judgment is reversed with instructions to the lower court to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

Ibach, C. J., Lairy, Adams, Hottel and Shea, JJ., concur.

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NOTE.—Reported in 101 N. E. 500. As to the negligence of a railroad in allowing the view at a crossing to be obstructed by trees, etc., on its right of way, see 10 Ann. Cas. 485; 12 L. R. A. (N. S.) 1067. As to the duty of railroad employes on approaching crossing as affected by obstruction of traveler's view of track, see 22 L. R. A. (N. S.) 232. For failure to give customary signals as excusing non-performance of duty to look and listen, see 3 L. R. A. (N. S.) 391. On the traveler's duty as to place and direction of observation, see 37 L. R. A. (N. S.) 135. See, also, under (1) 38 Cyc. 1594, 1646; (2) 33 Cyc. 922; (3) 33 Cyc. 981, 985; (4) 33 Cyc. 1073; (5) 33 Cyc. 966, 1018; (6) 33 Cyc. 1012; (7) 33 Cyc. 1018, 1027; (8) 33 Cyc. 1031; (9) 29 Cyc. 630, 631, 633; (10) 33 Cyc. 1010; (11) 33 Cyc. 924; (13) 29 Cyc. 634, 640; (14) 33 Cyc. 1138, 1140; (16) 33 Cyc. 1137; (17) 33 Cyc. 270, 271, 1100; (18) 3 Cyc. 386.

FALL CREEK SCHOOL TOWNSHIP OF MADISON COUNTY v. SHUMAN.

[No. 8,106. Filed December 18, 1913.]

1. **APPEAL.—*Exceptions to Conclusions of Law.—Findings.***—For the purpose of their consideration, exceptions to conclusions of law stated by the trial court admit that the facts were fully and correctly found. p. 235.
2. **DEEDS.—*Conditions Subsequent.—Effect.***—The title to property conveyed upon a condition subsequent does not vest in subsequent grantees of the original grantor upon the happening of the condition, or abandonment of the property, but vests in such grantor or his heirs upon a proper reentry. p. 236.
3. **DEEDS.—*Conditional Limitations.—Effect.***—Under a deed conveying property subject to a conditional limitation, upon the determination of the estate, the title vests *ipso facto*, and passes to one at the time holding under a subsequent deed from the original grantor. pp. 236, 237.
4. **SCHOOLS AND SCHOOL DISTRICTS.—*Property.—Abandonment of Use.—Effect.***—Where property was granted to the trustees of a school township so long as used for school purposes, an abandonment of the school maintained thereon terminated the use of the township, regardless of the fact that a statute was in force authorizing or even requiring the reopening or reestablishing of such school. p. 236.
5. **DEEDS.—*Construction.—Conditional Limitation.***—A deed must be construed as a whole and the grantor's intention must control, hence a deed conveying property to the trustees of a school cor-

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poration and their successors in office forever, "so long as the same is used for school purposes," when considered in connection with the surrounding circumstances, the situation of the parties, and the condition of the parties, created an estate with a conditional limitation, so that the estate held by such school corporation vested *ipso facto*, on the abandonment of the school, in one who at the time held title under a later conveyance from the original grantor. p.237.

From Madison Circuit Court; *H. Clarence Austill*, Special Judge.

Action by Fall Creek Township of Madison County against Henry H. Shuman. From a judgment for defendant, the plaintiff appeals. *Affirmed*.

Lawrence V. Mays and *Henry C. Ryan*, for appellant.

Jesse C. Shuman and *Kittinger & Diven*, for appellee.

SHEA, J.—This was a suit by appellant to quiet title to, and for possession of certain real estate in Madison County, Indiana. No question is raised on the pleadings, therefore they need not be set out.

Special findings of fact were made and conclusions of law stated thereon by the court, the substance of which is as follows: On March 23, 1832, Henry Snell entered from the United States government, certain described real estate in Madison County, Indiana. By said entry and continuing in possession from that date to August 4, 1854, he became the owner in fee simple thereof. On August 4, 1854, he executed to appellant a deed of conveyance of a portion of said real estate as follows:

"Henry Snell, of Madison County, in the State of Indiana, quitclaim to the trustees of Fall Creek Township, and their successors in office forever, of Madison County, in the State of Indiana, in consideration of the benefit of common school, the following real estate in Madison County, in the State of Indiana, to wit: A part of the west half of the northwest quarter, of Section eight (8), Township Eighteen (18) North, of Range Seven (7) East, * * * containing about one-fourth (1/4) of an acre, so long as the same is used for school purposes. * * *"

The deed was duly acknowledged and recorded. Prior to the year 1848, the officials of Fall Creek Township took possession of the real estate, erected a log cabin on it, and in the same year began holding school therein. Some years later, this building was replaced with a frame school building, which was afterwards removed, and another schoolhouse erected. In 1894, this was removed and a brick schoolhouse which is now standing, was erected on the land and is worth about \$1,000. The real estate with the several buildings thereon was used for school purposes continually from 1848 to the end of the school year in March, 1908. In the spring of 1908, it was found that the daily attendance during the last preceding school year fell below twelve, and the scholars were transferred to another district where they have since attended school. In August, 1908, the school trustee removed all the school furniture, including seats, blackboard and maps from the building to another district, leaving the stoves and school bell. The trustee at that time notified appellee Shuman that the township was not intending to abandon the schoolhouse and premises. At the time of removal of the furniture from the building in August, 1908, it was the intention of the trustee to discontinue and abandon the school at that place, and from that time there has been no school on the premises, nor effort made to reinstall the same. The enumeration of 1910 showed the number of children between the ages of six and sixteen years, residing in the district to be twenty-five. Soon after the acts of the trustee, appellee Shuman took possession of the school building, locked the same, and has ever since continued in possession thereof, and is claiming an interest in and title to the real estate. Appellant was in peaceful, continuous and uninterrupted possession of the real estate from August 4, 1854, until August, 1908, and the only claim of ownership or title made by it was that conveyed and granted by the deed of conveyance to it. Henry Snell continued to own the real state and all interest therein except that conveyed

to appellant until January 11, 1861, when he conveyed to William Snell by deed with covenants of general warranty the entire tract, without exception or reservation on account of the conveyance made to appellant. Afterwards, and prior to March, 1908, the real estate was conveyed to appellee Shuman, his respective grantors conveying the entire tract without reservation on account of the deed to appellant, and since that time, Shuman has been the owner of all the interest in the real estate which was owned by Henry Snell after the execution of the deed to appellant. Shuman, at the time the conveyance was made, and each of his grantors, at the time they acquired the real estate, respectively, had full notice and knowledge of the deed executed by Henry Snell to appellant, and that appellant was in possession of the real estate and occupying it for school purposes.

Upon these facts the court stated its conclusions of law to be: (1) The deed of conveyance from Henry Snell to appellant, executed on March 4, 1854, did not convey to appellant a fee simple title to the real estate; (2) said deed did not convey the title to the real estate described therein with a condition subsequent; (3) said deed conveyed to appellant the right to the possession and to use said real estate for such time as appellant should continue to use and occupy it for school purposes; (4) appellee Shuman is the owner of said real estate; (5) appellant is not entitled to have its title thereto quieted as against appellee; (6) appellant is not entitled to possession of the real estate as against appellee Shuman. Judgment was rendered accordingly.

The evidence is not set out in appellant's brief, therefore no question is raised as to the sufficiency of the evidence to support the special findings of fact. For the purpose

1. of considering the exceptions to conclusions of law, the exceptions thereto admit that the facts have been fully and correctly found. *National State Bank v. Sanford Fork, etc., Co.* (1901), 157 Ind. 10, 15, 60 N. E. 699; *City of*

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Indianapolis v. Board, etc. (1902), 28 Ind. App. 319, 323, 62 N. E. 715; *Ladd v. Kuhn* (1901), 27 Ind. App. 535, 540, 61 N. E. 747. Many points are discussed by the learned counsel in their briefs, but it is the judgment of the court that the whole question here depends upon the construction to be

given to the deed of Henry Snell to appellant. If it

2. be a deed conveying a title with a condition subsequent, appellee is not entitled to recover in this case, because the title would not vest in the grantees of Snell, upon the abandonment of the property, but in him or his heirs, upon proper reëntry. *Higbee v. Rodeman* (1891), 129 Ind. 244, 28 N. E. 442; Tiedeman, Real Property §281. If it

be construed to be a deed with a conditional limita-

3. tion, and the estate created has been determined, then the judgment of the lower court should be sustained, as the title then vests *ipso facto* upon the happening of the contingency stated in the deed, and the title in question passes to the holder of the title derived through the deed of the original grantor, held in this case by the appellee. 2 Washburn, Real Property (4th ed.) 24; *Miller v. Levi* (1871), 44 N. Y. 489.

Many questions are suggested by appellant's learned counsel with respect to the various statutes defining the duties of

township trustees governing district schools, but the

4. special findings in this case are conclusive upon that subject, and are unequivocal in the statement that the trustee intended to abandon the school. Therefore, the fact that a statute is in force which authorized or even required the trustee to reopen or reëstablish the school in this district can not affect the title to this real estate. His abandonment of the school in the first instance is the act which terminates his use. *Eaton v. Allegany Gas Co.* (1890), 122 N. Y. 416; *Shenk v. Stahl* (1905), 35 Ind. App. 493, 74

N. E. 538. It is stated in 2 Washburn, Real Property

2. (4th ed.) 24, that the distinction between a condition subsequent and a conveyance with a limitation

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• upon the title is technical, but clear. An example
3. may be given by changing somewhat the language of the deed in controversy. If the original grantor had stated in terms that the land was conveyed to the township to be used for school purposes, it would have been a condition subsequent, and in order to divest the township of title, there must have been a reëntury by the original grantor or his heirs. But the language in this deed—"so long as the same is used for school purposes", divests the title *ipso facto* upon the happening of that event, and appellee in this case holding the legal title by conveyances from his grantors is entitled to recover.

Some confusion arises in the construction of this deed because of the following language in the first clause, "to the Trustees of Fall Creek Township, and their suc-

5. cessors in office forever". The word "forever" would seem to indicate that the grantor intended that the property should vest in fee simple in Fall Creek Township, and if that be the correct view, it would completely nullify the language in the last clause. It is a well settled rule, however, that the deed must be construed as a whole, and the grantor's intention must control. In 2 Devlin, Deeds (3d ed.) §844a this language is found: "If possible, some effect must be given to every word in a deed and it must be harmonized with the other language of the conveyance. The modern rule is that the grantor's intention should control. In construing the instrument, it is to be taken as a whole, and the plain intent of the grantor will prevail over technical words of legal signification." In the case of *Uhl v. Ohio River R. Co.* (1902), 51 W. Va. 106, 114, 41 S. E. 340, it is said: "As to wills the rule has ever been that regardless of form or orderly parts, we must look at the real intention; but this has not been the case in the construction of deeds. Deeds have orderly parts, technical words of precise legal signification, and in times gone by those parts and words, and the strict rule of construction

of them, have been rigorously observed often defeating the manifest intention. Modern construction, however, has leaned towards the intention, overriding mere form and technical words, and nowadays it may be said that the intention must rule the construction in deeds as well as in wills.” This is also the rule in Indiana. *Figgins v. Figgins* (1913), 53 Ind. App. 43, 101 N. E. 110; *Evans v. Dunlap* (1905), 36 Ind. App. 198, 75 N. E. 297; *Tinder v. Tinder* (1892), 131 Ind. 381, 30 N. E. 1077; *Scott v Michael* (1891), 129 Ind. 250, 28 N. E. 546.

It is our judgment that the estate created by this deed was one with a conditional limitation, and the abandonment of the school by the township trustee, even after a lapse of so many years, as shown by the special findings, terminates the estate held by said township *ipso facto*. 2 Washburn, Real Property (4th ed.) 24; *Ashley v. Warner* (1858), 77 Mass. 43; *Shenk v. Stahl, supra*; Tiedeman, Real Property §281; *Green v. Gresham* (1899), 21 Tex. Civ. App. 601, 604, 53 S. W. 382; *Atlanta Consolidated St. R. Co. v. Jackson* (1899), 108 Ga. 634, 638, 34 S. E. 184. The language of the deed, taken together with all the surrounding circumstances connected with the transaction, the situation of the parties, and the condition of the country, the estate granted, its condition and occupation, warrants this court in holding that the construction given to the deed by the lower court was the correct one; that the words “so long as the same shall be used for school purposes” limit the title, and must also be taken to qualify and modify the word “forever” in the first clause. *Figgins v. Figgins, supra*; *Proctor v. Maine Cent. R. Co.* (1902), 96 Me. 458, 52 Atl. 933; *Moran v. Lezotte* (1884), 54 Mich. 83, 19 N. W. 757. Judgment affirmed.

NOTE.—Reported in 103 N. E. 677. As to mode of taking advantage of breach of condition subsequent, see 93 Am. St. 572. As to what words create condition subsequent, see 79 Am. St. 747. See, also, under (1) 38 Cyc. 1992; (2) 13 Cyc. 706, 711; (4) 35 Cyc. 924; (5) 13 Cyc. 601, 604, 699.

MODLIN ET AL. v. BOARD OF COMMISSIONERS OF
THE COUNTY OF GRANT.

[No. 8,769. Filed December 18, 1913.]

1. COUNTIES.—*Boards of County Commissioners.—Liability.—Breach of Contract*—In the letting of a contract for the construction of a highway, the board of county commissioners represents the sovereign power of the State, and is not liable in damages in reference to such contract. p. 241.
2. APPEAL.—*Jurisdiction.—Moot Questions*.—Where there is no question of general public interest involved in an appeal, and nothing is in dispute between the parties under the issues of the case on which the court could grant relief by any judgment it might render, jurisdiction will not be retained to determine merely an incidental question of costs. p. 241.
3. APPEAL.—*Jurisdiction.—Moot Questions*.—Where, after suit was brought to enjoin the letting of a contract for the construction of a highway, and prior to an appeal from the judgment rendered, the bid was let and the work was completed, so that a reversal of such judgment could not be followed by an injunction, the right to such injunction is merely a moot question requiring a dismissal of the appeal, even though appellant thereby becomes liable on the injunction bond, since the question of such liability is not an issue in the case before the court. p. 241.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Action by Hiram C. Modlin and another against the Board of Commissioners of the County of Grant. From a judgment for defendant, the plaintiffs appeal. *Appeal dismissed.*

Elias Bundy, for appellants.

Hiram Brownlee and *Orlando L. Cline*, for appellee.

FELT, J.—On March 6, 1909, the Board of Commissioners of Grant County, Indiana, in a regular proceeding, after due notice awarded to Hiram C. and Nathan P. Modlin, doing business under the name of Modlin Brothers, the contract for the construction of a certain macadam road for the sum of \$10,247. A bond was duly given for the completion of the road according to the plans and specifications

adopted therefor. There was no contract other than that which resulted from the acceptance of the bid by the board. The notice to bidders stated that the work should be completed by November 1, 1909. On September 23, 1909, the proceeds from the sale of bonds issued to provide funds for the building of said road were available. No actual work on said road was done by said Modlin Brothers.

Thereafter, by another notice duly given, by the board of commissioners, the work was advertised to be relet on May 3, 1910. On February 16, 1910, this suit was brought to enjoin appellee, the Board of Commissioners of Grant County, from reletting said contract. The appellants obtained a temporary restraining order, and thereafter on March 24, 1910, a demurrer for want of sufficient facts was sustained to appellants' complaint, and on refusing to plead over, judgment was duly rendered against them for costs.

An appeal from said judgment was taken and perfected, on January 30, 1911. Appellee has filed a verified motion to dismiss the appeal. The motion in substance shows the rendition of the judgment as aforesaid; that the only relief prayed for was an injunction against appellee to prevent the reletting of said contract; that forty days after the rendition of said judgment, and before any appeal was taken therefrom, upon due notice, appellee, on May 3, 1910, relet said contract to the firm of Alexander and Crosby for the sum of \$8,539; that they gave bond for the due performance of said work in accordance with the profile, plans and specifications, adopted therefor; that they entered upon said work at once and completed the same in accordance with the profile, plans and specifications aforesaid and on August 24, 1910, the duly authorized superintendent and engineer filed with the auditor of Grant County, Indiana, his verified report showing that said road had been completed in accordance with said plans and specifications; that thereafter on September 5, 1910, said board in regular session found that said road had been duly completed, accepted

the same and ordered the auditor to issue a warrant to said contractors for the balance due on the contract for the construction of said road which was done; that the acts sought to be enjoined by this suit have been consummated and if the judgment of the lower court should be reversed, no injunction could be granted the appellants. The only relief demanded by the complaint is an injunction against the letting of a contract which has been let, and under which the work has been completed, accepted by the proper authorities, and paid for in full.

If a reversal should be obtained, no injunctive relief could be granted and the complaint could not be amended so as to entitle appellants to damage for the reason that

1. in the letting of such contracts the board of commissioners does not act in a corporate capacity, but represents the sovereign power of the State and cannot be held liable for damages in reference thereto. *Donaldson v. State, ex rel.* (1910), 46 Ind. App. 273, 278, 90 N. E. 132, 91 N. E. 748; *Board, etc., v. Branaman* (1907), 169 Ind. 80, 86, 82 N. E. 65; *King v. Board, etc.* (1904), 34 Ind. App. 231, 72 N. E. 616.

Where there is no question of general public interest involved and nothing is in dispute between the parties under the issues of the case on which the court could grant

2. relief by any judgment it might render, jurisdiction will not be retained to determine merely an incidental question of costs. *State, ex rel. v. Boyd* (1909), 172 Ind. 196, 87 N. E. 140, and cases cited; *Manlove v. State* (1899), 153 Ind. 80, 53 N. E. 385. Since the act sought to

3. be enjoined has long since been consummated, if the judgment of the lower court should be reversed, no injunction could be legally issued. The question involved in this appeal, therefore, has become a moot question and the motion to dismiss the appeal should be sustained. *Wallace v. City of Indianapolis* (1872), 40 Ind. 287; *Hale v.*

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Berg (1908), 41 Ind. App. 48, 52, 83 N. E. 357; *State, ex rel. v. Board, etc.* (1899), 153 Ind. 302, 313, 54 N. E. 809; *Stauffer v. Salimonie Min., etc., Co.* (1897), 147 Ind. 71, 73, 46 N. E. 342; Elliott, App. Proc. §148. Appellants do not controvert the facts on which the dismissal is asked except to contend that in procuring a temporary restraining order they became liable to appellee for damages on the record as it now stands; that the sufficiency of their complaint should be determined by this court to decide the question of their liability on the bond given to procure the temporary restraining order. That question is not and cannot be an issue in this case. Under the decisions already cited, when the principal questions in issue have ceased to be matters of real controversy between the parties, the errors assigned become moot questions and the court will not retain jurisdiction to decide them or to decide questions incidentally or indirectly involved in the appeal. In *Hale v. Berg, supra*, this court quoted with approval from *Mills v. Green* (1895), 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, where it is said on page 51: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." It is also said that *Wallace v. City of Indianapolis, supra*, is not in point, for the reason that in that case the act which ended the controversy was consummated during the pendency of the appeal. This fact seems to emphasize the rule against appellants in this case for the reason that this appeal was not taken until after the act sought to be enjoined, viz., the letting of the contract, had been consummated.

Unless we may go outside the issues to find a reason for deciding the question presented by the appeal, the assignment of errors presents only a moot question and we find no authority warranting us in so doing. Neither do we

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believe any good purpose can be subserved by extending the rule. The rule as above announced is well established and has been uniformly followed by both our courts of appellate jurisdiction. The appeal is dismissed.

NOTE.—Reported in 103 N. E. 506. See, also, under (1) 11 Cyc. 411, 412; (2) 2 Cyc. 535; (3) 2 Cyc. 533.

**THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. CHAMPE, ADMINISTRATRIX.**

[No. 8,087. Filed October 17, 1913. Rehearing denied December 18, 1913.]

1. **PLEADING.—Complaint.—Initial Attack after Verdict.**—A complaint, attacked for the first time after verdict, will be held sufficient if it does not wholly omit some essential averment and is sufficient to bar another action for the same cause. p. 246.
2. **DEATH.—Actions.—Complaint.—Existence of Beneficiaries.**—A complaint against a railroad company alleging the names of decedent's children and that decedent's death was caused by the negligence of defendant's servants in charge of the engine which struck her is not affected by the allegation that "plaintiff is entitled to recover for and on behalf of the estate", but is within §285 Burns 1908, Acts 1899 p. 405, providing that an action to recover for the wrongful death of another must be brought by the personal representative of the decedent for the benefit of the widow and children, if any, or next of kin, and is sufficient without alleging that such children were dependent on decedent for their support. p. 246.
3. **RAILROADS.—Crossing Accidents.—Instructions.**—An instruction stating in general terms the degree of care required of a traveler on a highway on approaching a railroad crossing, as preliminary to the proposition that the burden of proof as to contributory negligence was upon defendant, was not, in view of other instructions stating the degree of care required of such traveler by the law, open to the objection that it left the degree of care required open to conjecture by the jury. p. 248.
4. **RAILROADS.—Crossing Accidents.—Presumptions.—Contributory Negligence.**—In an action for the death of one killed at a railroad crossing, the law indulges no presumptions as to the negligence of the defendant or the contributory negligence of the injured party. p. 249.
5. **APPEAL.—Review.—Harmless Error.—Instructions.**—In an action for the death of one killed at a railroad crossing, an instruc-

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tion informing the jury that an absence of evidence on the subject of contributory negligence created the presumption that decedent was in the exercise of the degree of care required by law, though erroneous, was harmless, where the jury's answers to interrogatories show that the verdict rested on facts proven and not upon any presumption. p. 249.

6. TRIAL.—*Instructions.—Repetition.*—Where the court had stated in one instruction the conditions under which the doctrine of last clear chance applies, it was not necessary to repeat them in another instruction in which the doctrine was referred to. p. 250.
7. APPEAL.—*Review.—Harmless Error.—Instructions.*—An instruction on the doctrine of last clear chance, even if open to the objections urged against it by appellants, was not harmful in view of answers to interrogatories affirmatively showing that the verdict does not rest on the doctrine of last clear chance. p. 250.
8. DEATH.—*Actions.—Measure of Damages.*—In an action under §285 Burns 1908, Acts 1899 p. 405, for a wrongful death, the damages are limited to the pecuniary loss suffered by the widow or next of kin for whose benefit the suit is maintained. p. 251.
9. APPEAL.—*Review.—Harmless Error.—Instructions.*—In an action for a wrongful death an instruction on the measure of damages clearly and definitely limiting the recovery to pecuniary loss, was not erroneous although it contained an expression which standing alone might be construed as fixing an erroneous standard for measuring the damages, and especially was the defect harmless in view of other instructions clearly stating that there could be no recovery except on proof of loss or damage sustained by those for whom the action was brought. p. 251.
10. DEATH.—*Excessive Damages.*—A verdict in an action for a wrongful death will not be set aside on the ground that the damages awarded are excessive, where it cannot be said from the evidence that the amount was excessive, although it appears to have been liberal. p. 252.

From Superior Court of Marion County (79,857); *Clarence E. Weir*, Judge.

Action by Amy A. Champe, administratrix of the estate of Eliza Champe, deceased, against The Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Carter & Morrison, Frank L. Littleton and Leonard J. Hackney, for appellant.

George W. Galvin, for appellee.

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FELT, J.—This was a suit for damages against appellant for the alleged negligent killing of appellee's decedent. From a judgment in favor of the appellee for \$1,650, appellant appeals and assigns as error: (1) Appellee's complaint does not state facts sufficient to constitute a cause of action; and, (2) error in overruling the motion of appellant for a new trial.

The complaint charges in substance that appellee is the duly appointed administratrix of the estate of Eliza Champe, deceased; that appellant is a duly organized railway corporation, and as such operates a railroad which passes through the city of Indianapolis; that there was at the time of the alleged accident in force in the city of Indianapolis, an ordinance, making it the duty of every engineer, conductor or other person engaged in running any locomotive to ring the bell attached thereto, when the engine was moving through the city and making it unlawful to run such engine at a greater rate of speed than four miles an hour, or to run the same between the hours of sunset and sunrise unless the engine was provided with a white light on the front end and a red light on the rear of such locomotive, car, or train of cars, and providing a fine for the violation of such ordinance; that on or about July 31, 1909, while appellee's decedent was in the proper and careful use of South New Jersey Street, in said city, where appellant's tracks cross the same, she was carelessly and negligently struck by one of appellant's engines, which was carelessly and negligently run and operated by it along said tracks, across said street, at a speed of more than four miles per hour, without ringing the bell on said locomotive and without a light on the front end thereof, all in violation of the ordinance of said city; that appellant carelessly and negligently ran said engine against said decedent, and thereby knocked her down and crushed and killed her; that decedent left surviving her, two children, Amy A. Champe and William Champe. "That by virtue of the laws of the State

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of Indiana, plaintiff is entitled to recover for and on behalf of the estate of Eliza Champe, the sum of Ten Thousand Dollars'', for which amount judgment is demanded.

To this complaint, appellant filed answer in general denial. Where a complaint is first attacked after verdict, the rule has been many times stated and followed that

1. it will be held sufficient if it does not wholly omit any essential averment and is sufficient to bar another suit for the same cause of action.

The objections urged to the complaint are: (1) that the suit is brought for the benefit of the estate of the decedent and not for the benefit of the children or next of kin; (2) that while the complaint alleges the names of the children of the decedent, it does not show that they suffered any damage by her death. Under the rules of pleading above announced, neither of the objections is tenable. The complaint alleges the names of the children of the decedent and avers facts showing that her death was caused by the negligence of the servants of appellant in charge of the engine which struck her. The facts averred bring the case under the provisions of §285 Burns 1908, Acts 1899 p. 405. The suit must be brought by the personal representative of the decedent "for the benefit of the widow and children, if any, or next of kin". Where the complaint alleges that the decedent left children surviving her, it is sufficient. It is not necessary to aver that such persons were dependent on the decedent for support, and proof of their pecuniary loss occasioned by the death may be received without such averments. *Salem, etc., Stone Co. v. Hobbs* (1894), 11 Ind. App. 27, 29, 38 N. E. 538; *Stewart v. Terre Haute, etc., R. Co.* (1885), 103 Ind. 44, 47, 2 N. E. 208; *Jeffersonville, etc., R. Co. v. Hendricks* (1872), 41 Ind. 48, 77; *Pennsylvania Co. v. Coyer* (1904), 163 Ind. 631, 634, 72 N. E. 875. The phrase "plaintiff is entitled to recover for and on behalf of the estate" is in the nature of a con-

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clusion and does not destroy the effect of the averment giving the names of the surviving children of the decedent.

A new trial was asked on the ground that the verdict of the jury is not sustained by sufficient evidence; that the verdict is contrary to law; that the damages assessed are excessive; and error in the giving and in refusing to give certain instructions. Certain interrogatories were submitted to the jury and in addition to the general verdict, they returned answers thereto. The substance of these answers reveals the main facts of the case as follows: That decedent was killed at about 8:30 p. m., on July 31, 1909, and was struck while walking south on the east side of New Jersey Street, at a point where the tracks of appellant cross said street; that she was struck by an east bound engine on the south track, after she had passed over three other adjacent tracks of the appellant; that there was a light on the engine that struck her but it was not burning at the time of the accident and had not been burning from the time the engine passed the viaduct west of New Jersey Street; that there was a bell on the engine but it was not ringing as it passed over New Jersey Street nor did it ring after the engine passed the viaduct, but did ring after decedent was struck; that she could not, by looking west before she entered upon the first track, have seen the engine that struck her had it been at any point within 250 feet of the place where she was struck; that just before she entered upon the track on which she was struck, she could not have seen the engine that struck her had it been at any point west and within 150 feet of the place where she was struck; that she was prevented from seeing by darkness; that she could not, as she approached the track on which she was injured, have seen the train in time to avoid being struck; that she could have heard the bell on the engine had it been ringing; that the bell did not ring continuously from the time the engine passed under the viaduct until it struck her; that her eyesight and hear-

ing were good; that the engine was moving four miles an hour when she was struck; that her view to the west was obstructed by piles of lumber and by the watchman's shanty; that the east sidewalk near the track on which decedent was struck was at the time partly obstructed by piles of cinders and railroad iron four to five feet in height and about sixteen feet in width and the same prevented decedent from having the free use of the sidewalk; that decedent could not, after she passed over the north track, tell by looking west, upon which of the several tracks an engine was approaching; that there were no lights at or near the crossing where decedent was struck and it was very dark; that she could not, by looking as she approached the railroad tracks at New Jersey Street, tell upon what track a locomotive was running if one was approaching; that after decedent was struck, the engineer moved the engine that struck her some distance away from the crowd and lighted the headlight on the engine; that those in charge of the engine that struck decedent, could by the exercise of reasonable care have discovered her presence and peril in time to have avoided injuring her; that those in charge of the engine did not, after it started west of the viaduct until it struck and killed decedent, sound the whistle or give any signal which indicated the approach of the engine to New Jersey Street; that the decedent was wearing a white shirtwaist; that the fireman or the engineer could, by looking, have seen all the tracks crossing New Jersey Street after he reached the west side of the street.

Appellant complains of the giving of certain instructions by the court and of its refusal to give certain instructions tendered by appellant. It is urged that by instruction

3. No. 10 the court undertook to state the degree of care required of a traveler on a highway when approaching a railroad crossing at grade, and that the court erred in not stating as a matter of law the degree of care required; also that the instruction left it to the jury to determine whether the traveler, in this case, exercised the care re-

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quired by the law. The instruction is not open to the objections urged against it. The court in instructions Nos. 13, 14 and 14½ stated to the jury the degree of care required of such traveler by the law, and in the first part of instruction No. 10 stated such rule of care in general terms as preliminary to the proposition that the burden of proving contributory negligence in such case rests upon the defendant. The degree of care required of such traveler was not left open to conjecture by the jury nor was the statement of the rule erroneous when considered in connection with the remaining portion of the instruction and the other instructions

given. The further objection is urged to this in-

4. struction that after stating that the burden was on the railway company to prove contributory negligence of the decedent, the court also informed the

5. jury that in the absence of any evidence on that subject, the presumption is, that the plaintiff's decedent did exercise such degree of care as the law requires. The law applicable to the case at bar as declared in this State indulges no presumptions as to the negligence of the appellant or the contributory negligence of the injured party, but leaves such questions to be determined from the evidence as ultimate facts. *City of Indianapolis v. Keeley* (1906), 167 Ind. 516, 525, 79 N. E. 499; *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697, 705, 88 N. E. 612. This part of the instruction was therefore erroneous and it remains to be determined whether the error was harmful to appellant. The answers of the jury to the interrogatories show clearly the actionable negligence of the appellant. By statute, contributory negligence is a matter of defense, the burden of proving which rests upon the defendant. The answers of the jury in this case are full and complete on the issuable facts and show affirmatively that neither the general verdict nor the answers to interrogatories were in any way influenced by the erroneous statement of presumption of due care on the part of the decedent. The physical facts found

by the jury in the answers to the interrogatories are of such a character as to show that no presumption could have changed or modified them in any respect, or influenced the jury in arriving at the general verdict; that the decision rests entirely upon facts proven by the evidence and not upon any presumption. The Supreme Court in *Evansville, etc., R. Co. v. Berndt, supra*, 705, held that an instruction similar to the one under consideration was erroneous, but harmless because there was no evidence tending to show contributory negligence. In the case at bar, the evidence tending to show contributory negligence consisted of statements to the effect that there was a light on the engine and that decedent could have looked west along the track and discovered it in time to avoid being struck. The jury by answers to the interrogatories found that the light was not burning as the engine approached and that decedent could not see the approaching engine because of obstructions and the darkness, and that no warning of any kind was sounded. The situation therefore is the same as if there had been no evidence on the subject of contributory negligence and the instruction though erroneous was harmless.

It is also insisted that the court erred in giving the jury instruction No. 15½. It is claimed that the instruction contains an incomplete statement of the doctrine of last clear chance and is erroneous by reason of the use of the word "opinion". The court did not, in this instruction, state in detail the conditions under which the doctrine of last clear chance is applicable, but it had already done so in instruction No. 9 and it was not necessary to repeat it. Furthermore, if erroneous, in the particulars claimed, the appellant was not harmed, for the answers to the interrogatories show affirmatively that the verdict of the jury does not rest on the doctrine of last clear chance, and that the case is one of ordinary actionable negligence on the part of the appellant resulting in the death of

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the injured party. In view of this finding, the error, if any, was harmless.

It is also contended that the court in instruction No. 18 gave the jury an erroneous standard of the measure of damages. Damages in such cases are limited to the

8. pecuniary loss suffered by the widow or next of kin for whose benefit the suit is maintained. *Consolidated Stone Co. v. Staggs* (1905), 164 Ind. 331, 337,
9. 73 N. E. 695; *Commercial Club v. Hilliker* (1898), 20 Ind. App. 239, 243, 50 N. E. 578. It may be conceded that in the closing part of this instruction the court used an expression, which standing alone might be construed to mean something more than pecuniary loss to the son and daughter. The instruction is long and need not be set out in this opinion. It clearly and definitely limits the recovery to pecuniary loss. Furthermore, in instruction No. 3 given by the court, the facts essential to a recovery are set out and it is there clearly stated that there can be no recovery unless the children of the decedent have been proven to have sustained loss or damage as a result of her death. In instruction No. 19 the court told the jury there was no presumption that the next of kin had suffered any pecuniary loss by her death and that before it could find that her children had sustained such loss, the fact must be established by a preponderance of the evidence, and if not so proven the verdict must be for the defendant. The instruction complained of when fairly construed gave a correct idea of the measure of damages and when considered in connection with the others given on the subject makes it certain that no harmful error was committed in the instructions complained of.

The other objections to the instructions given and refused have been carefully considered but are not of a character to require detailed consideration in this opinion. When fairly construed, the instructions given correctly informed

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the jury as to the law applicable to the case, and those refused which were applicable to the issues and evidence were covered by others given.

A new trial was asked on the ground that the damages assessed are excessive. While the amount is fairly liberal, after reading the evidence we can not say that it is

10. so excessive as to call for a reversal of the judgment by this court. *Indianapolis, etc., R. Co. v. Wall* (1913), 54 Ind. App. 43, 101 N. E. 680 and cases there cited.

The other contention of appellant that the verdict is not sustained by sufficient evidence is not tenable. The questions suggested relating to the proof are technical. Considering the inferences that may be drawn from the facts proven, there is no failure to connect appellant with the injury. We find no reversible error. Judgment is affirmed.

NOTE.—Reported in 102 N. E. 868. As to actions and damages for wrongful death, see 12 Am. St. 375; 70 Am. St. 669. On the question of presumption as to exercise of due care by person found killed at crossing, see 16 L. R. A. 261. As to what is an excessive verdict in an action for death by a wrongful act, see 18 Ann. Cas. 1209. See, also, under (1) 31 Cyc. 770; (2) 13 Cyc. 341-343; (3) 33 Cyc. 1138; (4) 33 Cyc. 1066, 1070; (5) 38 Cyc. 1815; (6) 38 Cyc. 1681; (8) 13 Cyc. 366, 367; (9) 38 Cyc. 1782; (10) 13 Cyc. 375.

VANDALIA RAILROAD COMPANY v. UPSON NUT COMPANY.

[No. 7,802. Filed March 11, 1913. Rehearing denied December 18, 1913.]

1. CONVERSION.—*Acts Constituting.*—A conversion implies some affirmative wrongful act in the disposition of the thing converted, or in withholding it from the rightful owner, that is, there must be a wrongful taking or detention, or an illegal use, misuse, or assumption of ownership, and a mere nonfeasance or failure to perform a duty imposed by contract or implied by law is not conversion. p. 254.

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2. **CARRIERS.—*Failure of Delivery.—Conversion.***—A mere nondelivery by a common carrier does not constitute a conversion, but a misdelivery may. p. 255.
3. **CARRIERS.—*Conversion of Freight.—Evidence.—Sufficiency.***—Evidence showing that a carload of iron was received by defendant railroad company to be delivered to the codefendant, that the delivery of the car required the placing of same in the yard of codefendant beyond a gate which was maintained across the switchtrack, the key to which was kept by codefendant, that the car was placed upon the track outside the gate on Friday, was checked by an employe of defendant as inaccessible on Saturday, and removed as empty on Monday, that the purported receipt of codefendant for the car was signed by defendant's conductor, who gave no notice to codefendant that the car was on the siding, that the car never passed within codefendant's gate and that it was never unloaded by codefendant, though failing to show what was the actual disposition made of the iron, while amply sufficient to show a nondelivery of the iron, does not support a finding that it was converted by defendant railroad company. p. 255.
4. **APPEAL.—*Waiver of Error.—Briefs.***—Alleged error in the ruling on a motion for new trial is waived by failure of the party asserting the error to set out the motion in its brief in compliance with Rule 22. p. 258.
5. **SALES.—*Liability for Price.—Failure to Deliver Goods.***—The purchaser of a car of iron is not liable for its value where there was evidence to support the jury's finding that the goods were never delivered to such purchaser or received by it. p. 258.

From Superior Court of Marion County (77,515); *James M. Leathers*, Judge.

Action by the Upson Nut Company against the Vandalia Railroad Company and another. From the judgment against it, the Vandalia Railroad Company appeals. *Reversed.*

Samuel O. Pickens and *Owen Pickens*, for appellant.

Louis Newberger and *Charles W. Richards*, for appellee.

IBACH, C. J.—This action was brought by appellee against appellant and the Home Stove Company to recover the value of a carload of pig iron. The complaint was in two paragraphs, the first alleging that the iron was sold to defendants at their special instance and request, and the second declaring on a special contract for the purchase of the iron. Trial

by jury resulted in a verdict for defendant Home Stove Company, and against appellant. Appellant has assigned as error the overruling of its motion for new trial, under which it argues that its motion for a peremptory instruction in its favor should have been sustained, that the evidence is insufficient to sustain the verdict, and that the court erred in giving and refusing to give certain instructions.

It was agreed in evidence that the carload of iron in question was ordered from appellee by the Home Stove Company on October 4, 1907, and was shipped from appellee's plant in Cleveland, Ohio, about October 12, 1907, in a car marked Erie 50361, by the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company to Indianapolis, and arrived at the place where it was to be turned over to appellant for delivery to the Home Stove Company. There was evidence that the iron was never delivered to the Home Stove Company, and the jury so found by its verdict in favor of that defendant. In order to uphold the verdict against appellant railroad company, it must appear that the evidence justified the jury in finding that appellant *converted* the iron in question, for there was no claim that appellant ever contracted to purchase the iron, nor can appellant be held in this action as a common carrier for a breach of its contract to deliver. Under the theory of the complaint, appellant can be held liable only upon the ground that it converted the carload of iron, and that appellee waived the tort and sued upon the implied contract to pay its reasonable value. Therefore, the one question of importance presented by the appeal is, Did the evidence justify the jury in finding that appellant converted the iron in question? Appellant urges that the evidence, construing it as strongly as possible in favor of appellee, shows no more than a failure to deliver, and that a mere failure to deliver is not a conversion. A conversion

- by a common carrier or other bailee implies some
1. wrongful act, a wrongful disposition, or withholding of the property. There must be an affirmative wrong-

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ful act, and mere nonfeasance, or failure to perform

2. a duty imposed by contract or implied by law, is not a conversion. There must be a wrongful taking or detention, or an illegal use, misuse, or assumption of ownership. A misdelivery by a carrier may be a conversion, but a mere nondelivery is not. *Magnin v. Dinsmore* (1877), 70 N. Y. 410, 26 Am. Rep. 608; *Bowlin v. Nye* (1852), 64 Mass. 416; *Wamsley v. Atlas Steamship Co.* (1901), 168 N. Y. 533, 61 N. E. 896, 85 Am. St. 699; *Davis v. Hurt* (1896), 114 Ala. 146, 21 South. 468; *Glaze v. McMillion* (1838), 7 Por. (Ala.) 279; *Alabama, etc., R. Co. v. Kidd* (1859), 35 Ala. 209.

The evidence shows that the iron in question was shipped in a car marked Erie 50361, to Indianapolis, and there turned over to appellant to deliver to the Home Stove

3. Company. Appellant's sidetrack runs north and south along the side of the Home Stove Company's plant, for about 200 feet until it reaches a gate, entering the Home Stove Company's yard, and from this point the sidetrack runs south into the yard for about 250 feet. The gate, which extends across the track, was kept locked at all times except when it was necessary to put cars in and out of the yard, and the key was kept in the stove company's office. It was the custom of appellant to set the cars inside the gate that they might be unloaded, and we may say that the legitimate inference from the evidence is that delivery of cars from appellant to the Home Stove Company was not completed until the cars were taken through the gate and placed ready for unloading. From the records of appellant placed in evidence it appears that car marked Erie 50361, loaded, was set on the siding north of the gate on October 18, 1907. On October 19, 1907, the car was checked on that siding by an employe of appellant as inaccessible. October 20 was Sunday, and the Home Stove Company's plant was idle, and there is not a record of the car on that day. On October 21, according to the records of appellant, the car

was removed from the siding as empty, was inspected appellant's yards and recorded as empty, and it is recorded as having been sent out empty in a train on October 18, 1907. Appellant's conductor, who placed the car on the siding, admitted that he had signed the initials of the Home Stove Company to a paper purporting to be a receipt for the iron from that company on October 18, 1907, and admitted that he had given no notice to any agent or representative of the company when he placed it on the siding. It appears that this was not the first time he had signed the initials of the Home Stove Company, but that he had never signed them with any authority from such company, or any of its agents. All of the several witnesses of the Home Stove Company testify positively that the car never passed within its gate. Its superintendent testifies that the iron was ordered for a special purpose, and he was on the lookout for the shipment that he passed up and down the siding about five or six times a day, and that it was not on the siding on October 18, 1907. The evidence is positive and uncontradicted that the iron was not unloaded by the Home Stove Company on the siding, either to the north or south of the gate. There is no evidence to show what was the actual disposition of the iron.

The jury found in answer to interrogatories that the car was placed by appellant on the sidetrack of the Home Stove Company on October 18, 1907, north of the gate, that no notice was given to any officer or agent of the Home Stove Company after placing it on the siding, that the car was not unloaded north of said gate, and that it was not on October 19, 20 or 21 moved to the south of said gate, and that the car was never accepted by any officer or agent of the Home Stove Company.

What became of the iron seems to have been a mystery to the plaintiff, to both defendants, to their counsel, and to the witnesses, and it is a mystery also to the writer of this opinion. But counsel for appellee suggest that the jury adopted as the most reasonable solution of the difficulty,

theory that the loaded car was set upon the siding, by appellant, and was removed by it loaded. There is evidence to show that the car was set upon the siding loaded, and if this is true, then it must have been either unloaded there, or removed loaded. The jury, it is contended, might have believed that the car was removed loaded. Then, appellee's counsel contended, if appellant removed the car loaded, and later refused upon demand to deliver the iron to the Home Stove Company, there was such a misdelivery and wrongful appropriation and detention of the property by appellant as to constitute a conversion.

However, our view of the evidence is not the same as that of appellee's counsel. The evidence, as detailed above, is amply sufficient for the jury to find that the iron was never delivered to the Home Stove Company. But we do not think it sufficient to show that appellant converted the iron. It appears that the iron was delivered to appellant, and that appellant never delivered it to the Home Stove Company. Such evidence might make out a case of failure to deliver as a carrier, but there is no direct evidence of any positive wrongful act on the part of appellant, inconsistent with plaintiff's ownership, which would constitute a conversion. The signing of the Home Stove Company's initials to the receipt by appellant's conductor alone would not constitute such an act. The most, perhaps, that can be inferred from the evidence is that the iron was lost, and a carrier is not liable for a conversion where goods are merely lost. We do not think that the jury was justified in finding from the evidence that appellant converted the carload of iron, and therefore the court erred in overruling the motion of appellant Vandalia Railroad Company for a new trial, and for that error the judgment must be reversed as to appellant Vandalia Railroad Company.

Appellee Upson Nut Company has attempted to make the Home Stove Company a party to the appeal, and has as-

signed as error against it that the court erred in overruling the separate motion of the Upson Nut Company.

4. a new trial. This error has been waived by failure to set out the motion for new trial in the Upson Nut Company's brief, under Rule 22 of this court.

5. ever, upon the evidence, the jury was fully justified in finding that the iron was never delivered to the plaintiff, received and accepted by the defendant Home Stove Company, and consequently it is not liable for its value.

The judgment is affirmed as to the defendant Home Stove Company, and reversed as to appellant Vandalia Railroad Company.

Adams, Lairy, Shea, J.J., Felt, P. J., concur, Hottel dissents.

DISSENTING OPINION.

HOTTEL, J.—“The one question of importance presented by this appeal” and determined by the prevailing opinion as stated therein is, “Did the evidence justify the jury in finding that appellant converted the iron in question?” The judgment is reversed on the theory that the question should be answered in the negative. With this conclusion we do not agree. It is well settled by the decisions of the Supreme Court and Appellate Court of this State that if there be evidence upon this question which can be said to have warranted the jury in finding or inferring that there was conversion, its verdict will not be disturbed by this appeal. It is also well settled that in determining such question the court must look to that evidence alone which is most favorable to the appellee.

In dissenting from the prevailing opinion, we feel that we should indicate a part, at least, of the evidence, upon which such dissent is based. By a stipulation of the parties it is shown that the Home Stove Company's factory and yards are situate adjacent to Kentucky Avenue in the city of Indianapolis and are connected by a stub switch with the Indianapolis

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apolis and Vincennes division of the appellant Vandalia Railroad Company's line; *that this is the only line of railroad over which cars can be gotten into and out of the Home Stove Company's plant and yards*; that the Vandalia Railroad Company's line connects with the line of the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company (commonly known as and called the Big Four) at another point in the city, and that the Cleveland, etc., R. Co.'s road extends from this connecting point to the city of Cleveland, Ohio; that on about October 12, 1907, and after the order for the iron was given and accepted, appellee at Cleveland, Ohio, loaded into Erie car No. 50361 and delivered to the Cleveland, etc., R. Co. for transportation to the Home Stove Company at Indianapolis, Indiana, 50,000 pounds, that is, 22.321 tons pig iron of the kind and quality described and designated in the order; that the car was marked consigned to the Home Stove Company, Indianapolis; that the car with the iron therein arrived at the connecting point of Cleveland, etc., R. Co. and the defendant Vandalia Railroad Company in Indianapolis on or before October 18, 1907.

The following further facts are either conceded or not seriously disputed. The consignee's plant not being on the line of the initial carrier, the car, loaded with the iron in question, on its arrival in Indianapolis, was delivered to and accepted by appellant on October 18, 1907, for delivery to the consignee. The point of the car's receipt by the appellant from the connecting line was at or near a place or switch yard known as the Caven Yard, which was about two miles from the stove company's yards. The stub switch which led from the appellant's track to the Home Stove Company's plant and thence into the latter's yard had a gate across it where it led into the yard. It was the custom of the stove company, well known to, and for several years observed by, the railroad company to receive and unload pig iron only on the inside or south of this gate. This gate was kept locked. It was the practice for the railroad com-

pany's trainmen in delivering cars to the stove company to go to the office, where the gate key was kept, and have some one open the gate to admit the cars and then to procure a receipt for the cars delivered and placed according to custom. Appellant's records, made at the time, and as a part of the transaction, show that it took this car from the Caven Yard on the morning of October 18 and about 9:30 a. m. placed it, with pig iron therein, on the Home Stove Company's switch somewhere to the outside or north of this gate. At the time he made such delivery, appellant's conductor did not obtain the consignee's signature to the customary receipt required by appellant but in lieu thereof, the conductor, without any authority to do so, signed the initials of the consignee to a freight form receipt, which he was accustomed to use as a receipt form in procuring the signature of consignees, and he delivered such receipt to his company and his superiors as and for the consignee's genuine receipt. There is no evidence that appellant or its agents placed this car according to their custom and habit at the usual and proper place for unloading, on the Home Stove Company's switch, and no direct evidence that the car was ever south of the gate or on the inside of the yard.

Delos A. Alig, who went to appellant's offices at the Union Depot at Indianapolis to get some trace of the missing property testified in substance as follows: “* * * I met a clerk there who said he had charge of the records. We went over the records for car Erie No. 50361. I made a memorandum of my investigation. I went with the clerk to make the investigation, and he told me he had looked for the record of the car leaving the switch, but was not able to find it. I went upstairs, where these records are kept, to look for it. We did not find any slip showing car No. 50361, nor the slip now marked ‘Exhibit No. 8.’ * * * The * * * young man said he had made several searches for the record showing the car being taken off the switch but had been unable to find it. My recollection is

that the slips showing outgoing cars were filed together and the slips showing incoming cars were filed together in the same room. In making my search I looked at a bunch of slips for October, 1907, showing the cars coming out of the switches. * * * I did not find any slip referring to October 18th for outgoing cars. I did not find one for October 19th. I do not remember whether there was a slip for October 20th. *I am positive I saw a slip for October 21st.* * * * *I did not see the card now marked 'Exhibit No. 8.'* *I did not find that card in the files and that was what I was looking for. I did not find any card of October 21st in the file purporting to show removal of car 50361 from our switch. I looked for the entire month of October. I made that investigation last spring, about the first of last April.* * * * *I called Mr. Picken's attention to the fact that there was a link in the chain of evidence out. I told Mr. Davidson that the record was missing. I told Mr. Richards it was missing, of Morris & Newberger.* * * * When I was making the examination at the Union Station I was looking for any report showing the taking of that car off the switch." Exhibit No. 8 referred to in this witness's evidence is the exhibit introduced in evidence by the appellant showing the removal of car 50361 empty on October 21, 1907.

Otto F. Alig, the superintendent of the Home Stove Company, testified in part as follows: "I was the superintendent at that time. There are five doors leading out on the side of the building to the track. I directed the setting of cars on that switch. On the 18th, 19th and 21st of October, 1907, I was along that switch about six to a dozen times a day. On neither of those days did I give any order or direction to any one concerning the setting of this car known as Erie No. 50361. * * * On neither of these days did I see any carload of iron from the Upson Nut Company, being No. 1 Upson iron, either south or north of the gate on the switch. On neither of those days did I see any iron un-

loaded from any car along that switch, either inside or outside of the gate. So far as I know the car never came onto the switch. The car was not on the switch. When the car was placed on our switch in a position where it could be unloaded we would telephone the Vandalia yard and they would come over and set it. * * *

Testimony of W. J. Power. "I am employed at the present time by the Home Stove Company. I have been employed there five and one-half years. During the month of October, 1907, I was there as time keeper and kept the car records. * * * I do not remember anything about this car Erie 50361, on the 18th, 19th or 21st day of October, 1907. I made true and correct entries of each car on the switch of the Home Stove Company in my car record. I do not remember that on the 18th, 19th or 21st day of October, 1907, Erie car 50361, loaded with Upson No. 1 pig iron, came onto our switch. I examined this switch for the cars on these days. * * * On Exhibit No. 6 the 'Inx' for Erie 50361, Erie, pig iron, is not in my handwriting. I do not know in whose handwriting it is. * * * I made an examination of the switch every morning for the month of October, 1907, about 8:30 * * * inside and outside the gate. * * *. When a car of pig iron is put on the switch of the gate, for the reason that there are coal cars inside the gate, the engine is called by Mr. Alig to do the switch to get the pig iron inside and unload it. * * *. O K'd the cars on these slips on account of the car set because of demurrage. When the cars were brought in and not set they were not to be charged demurrage. * * *. The Vandalia Railroad Company is the only one that has ever switched or set cars on our switch. I did not see Mr. Corey out there on our switch on the 19th. I did not make a remark to him that this car 50361 was inaccessible. Exhibit No. 6 referred to by this witness is an entry made and identified by appellant's witness Corey as a slip or record made by him of cars on Home Stove Company's switch."

on October 19, 1907, and this slip showed car 50361 on the Home Stove Company's switch on said day, the slip contained after the car No. 50361 the letters "Inx" which the witness Corey testified was put on the slip by Mr. Powers and indicated that the car was inaccessible.

George Alig, Jr., testified in part as follows: "• • • I received no information concerning that car other than from Mr. Cash and Mr. Graham, the railroad company's employes. I asked them for records, and got none. I made that investigation with Mr. Power. *I saw the slips marked Exhibits Nos. 6 and 7, and also the cards marked Exhibits Nos. 4 and 8, there in the Vandalia freight office. On none of these sheets or cards did I see any information concerning the car Erie 50361.* They did not show me anything to the effect that the Vandalia Company received the car at Caven Yard, nor that the car service man had found the car on the switch one day and the following day removed. They did not show me a slip of the freight conductor to the effect that on a certain day he had hauled the car off the switch empty, or gone out empty with the freight train somewhere else. • • •"

The letters between appellant and appellee and between appellee and the Home Stove Company, introduced in evidence, show that appellant, before the trial, was insisting that it had delivered the iron in question to the consignee. On one occasion, the appellant presented the consignee with its unauthorized receipt for the car, saying "Here is your receipt for this car".

It is conceded in the prevailing opinion and supported by decision of courts of other jurisdictions there cited, that "*a misdelivery by a carrier may be a conversion*". (Our italics.) Some of these decisions indicate that there may be a misdelivery as to place as well as to person. In the case of *Bowlin v. Nye* (1852), 64 Mass. 416, the court said: "*A misdelivery of the goods by the defendant would have been a conversion of them, and would therefore have ren-*

dered him liable in trover; for it would have been an *unlawful act*. * * * But there is no proof of misdelivery in the present case. It does not appear *where or to whom the goods were delivered, if at all, or where they ought to have been delivered.*" (Our italics.) Again, in the case of *Wamsley v. Atlas Steamship Co.* (1901), 168 N. Y. 533, 61 N. E. 896, 85 Am. St. 699, the following language is quoted by appellant in its brief: "Trover will lie when goods have been lost to the owner by the act of the carrier, though there may have been no intentional wrong; as when goods are by mistake, or under a *forged order*, delivered to the wrong person. But it will not lie for the mere omission of the carrier; as where the property has been stolen or lost by his negligence, and so cannot be delivered to the owner." See, also, *Pittsburgh, etc., R. Co. v. Nash* (1873), 43 Ind. 423, 427, 428.

The facts in this case show that, at the express request of the stove company, appellant had long been in the habit of delivering on its private switch south of, and *inside its gate*, cars consigned to it, loaded with pig iron, as was the one in question, and there getting the receipt of such company from one of its agents, usually the man in whose office the key to such gate was kept. On this occasion, the custom was violated and the car in question delivered north of and outside of such gate. There was no notice given the consignee of such delivery. The usual and customary receipt, required by appellant of its agent upon whom it imposed the duty of making such delivery, was not obtained from the consignee, but in lieu thereof, such agent, without the authority of the consignee, signed its initials to such receipt and this receipt, which was the only written evidence of delivery to the consignee ever required by appellant in such cases, was reported and turned in to appellant according to such usual custom.

Appellant now contends, and the theory of the prevailing opinion seems to be, that these facts merely show a failure to

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deliver the property to the consignee and are not sufficient to even warrant an inference of misdelivery. This claim and theory seem to have been recently adopted by appellant. The evidence discloses, that appellant by its correspondence, words and conduct, before trial, was insisting that it had delivered the iron in question to the consignee. Let us examine the evidence with a view of determining whether there is any evidence warranting the jury in inferring that there was a misdelivery, or whether it was of such a character as should have forced the jury, and therefore this court, to conclude that only a failure of delivery is shown. The appellant's conductor who last had charge of the car, was the person upon whom the duty of delivery to the consignee was imposed by appellant. Did he deliver the car with the iron in it? He says so, in effect, at least. It is not disputed by him or by his principal that he set the car on the consignee's private switch. Did he thereby intend a delivery to the consignee? He undoubtedly did, or why did he sign and file with his principal the customary receipt taken from the consignee in such cases, thereby furnishing the only evidence of delivery ever required or obtained in such cases by his principal? Upon this subject such conductor said: "*After delivering the car it was not convenient and some way or other to get some one to sign for the car after delivering it. I signed this myself, just putting 'H. S. Co.'* and turned it in. *That is to show Mr. Graham when he got that receipt that the car had been delivered and set. That is the object of this paper. I was accustomed to use that sort of a form and returned it to the home office upon the delivery of each car to the consignee. It is the customary form for indicating that the car had been delivered to the consignee. * * ** I did not have any authority to sign the Home Stove Co's. initials to this paper. *It was a part of my duty to deliver a paper of this kind to the consignee and get this signature. The idea of papers of this kind is merely to show, or to put on record, that the*

car has been delivered. It was for the purpose of getting receipt of the consignee for the delivery of the car."

This language from the appellant's agent, who last had charge of the car, and upon whom was imposed the duty of delivering, would seem to be sufficient to warrant at least an inference by the jury that such agent regarded and treated the car as delivered when he so placed it on the consignee's private switch, and signed the receipt of the consignee therefor. Did appellant, the conductor's principal, receive his receipt for delivery of the car and treat it as evidence of delivery of such car and contents, and afterwards claim and rely on such delivery? If not, why, all of its correspondence and communications with shipper and consignee before suit, did it claim that it had delivered the property in question to the consignee and why did it present such consignee with a receipt saying, "Here is your receipt for this car"? It seems to us that such evidence ought to be sufficient to warrant an inference that appellant thought and acted as though it had made some kind of delivery. If there was some kind of a delivery, what kind was it? Was it a delivery at the proper place to the proper consignee? The consignee says it did not get the iron and we do not understand that it is now contended that such receipt therefor, admittedly signed without its authority, was sufficient to force the jury to conclude that it did. To us the conclusion is irresistible that the jury had evidence before it, which warranted an inference of misdelivery of the iron in question. Under this evidence, what element of misdelivery is lacking either as to person or as to place? What more could have been, or would have been, required to constitute a misdelivery? That the delivery in question was not at the usual or customary place of delivery is undisputed. The placing of the car on the switch outside the consignee's gate, with intent to deliver it, in violation of the established custom and understanding between appellant and the consignee, was a wrong delivery or misdelivery.

as to place, at least, and we think the evidence also shows or tends to show a misdelivery as to the person to whom the delivery should have been made. Suppose this same conductor and agent of appellant, when he set this car out on the stove company's private switch, thereby intending a delivery to such consignee, had innocently taken the receipt of some stranger to such consignee who had no authority to sign such receipt, and appellant, relying on such receipt, afterwards, on demand, had refused and failed to deliver the iron, would it be heard to say, under such circumstances, that it had not misdelivered the iron? The decisions relied on by appellant would not authorize such a conclusion. Wherein lies the difference and distinction between the assumed case and the case at bar? Does the fact that the stranger signed the receipt in the assumed case, while appellant's agent signed it in the case at bar, make a misdelivery in the one case and a mere failure to deliver in the other case? Is the situation of the parties, so far as delivery is concerned, altered by reason of the fact that appellant's agent, upon whom it had imposed the duty of delivery, while performing such duty, assumed to act and did act, without authority, as the agent of the consignee in accepting delivery? The difference between the two cases is that the stranger in the assumed case acts as consignee and furnishes the forged or unauthorized receipt and evidence of delivery required by appellant of its agent, in such cases, while in the case at bar, appellant's agent to make the delivery, also acts as the consignee's agent in accepting delivery, and, instead of innocently furnishing his principal the consignee's receipt, as in the assumed case, he, knowingly and intentionally, signs and furnishes such unauthorized receipt and evidence of his delivery. This difference is unfavorable rather than favorable to appellant's contention. In the assumed case, appellant would have in its favor the fact that the wrongful delivery to the stranger was innocently and unintentionally made, which would be some reason for

holding that the wrongful and tortious element necessary in cases of conversion was lacking, while, in the case at the delivery is robbed of such innocent intent and innocence is tainted with the intentional and wrongful act of the appellant's agent in signing and furnishing to his principal the unauthorized and forged receipt of the consignee as evidence of his delivery. To hold that the evidence in this case conclusively shows a failure to deliver only, and for this reason there was no conversion of the property in question, makes it possible for appellant to take advantage of its own wrong and repudiate its own act of delivery made by its agent who furnished it the usual and only evidence of delivery required by it. Characterize the attempted delivery of appellant as you will, call it a failure to deliver or a misdelivery, its acts and conduct as shown by the evidence in this case were of such a character as to justify and warrant the jury in inferring that it converted the property in question. This act of appellant's agent in accepting and receipting for such car after he had placed it on the consignee's private switch, as and for a delivery to the consignee, was an exercise of dominion and authority over the contents of such car, inconsistent with his principal's possession and control of such property and illegal, wrongful and tortious as against the consignee and shipper, therefore, under all the authorities, including those cited by appellant, constituted a conversion of the property of the appellant. A conversion of property may result from a mere failure to deliver. *Baltimore, etc., R. Co. v. O'Donnell* (1892), 49 Ohio St. 489, 32 N. E. 497, 21 L. R. A. 117, 10 Am. St. 579; *Clement v. New York, etc., R. Co.* (1890), 18 N. Y. Supp. 601; *Hamilton v. Chicago, etc., R. Co.* (1890), 103 Iowa 325, 72 N. W. 536; 6 Cyc. 474. An unauthorized diversion or removal of goods by the transporting carrier has been held to be a conversion.

In the case of *Baltimore, etc., R. Co. v. O'Donnell*, supra, 497, that court said: "Unless the justification was est-

lished, there appears to have been evidence, as shown by the record, from which the jury might find, as they did, that there was a conversion of the goods by the defendant; for, in order to constitute a conversion, it was not necessary that there should have been an actual appropriation of the property by the defendant to its own use and benefit; *it might arise from the exercise of a dominion over it in exclusion of the right of the owner, or withholding it from his possession under a claim inconsistent with his rights.* If one take the property of another, for a temporary purpose only, in disregard of the owner's right, it is a conversion. Either a wrongful taking, an assumption of ownership, an illegal use or misuse, or a *wrongful detention of chattels, will constitute a conversion.* 'Whoever' * * * 'takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them,' and is guilty of conversion." 6 Cyc. 474, note 62 and cases cited; *Richmond, etc., R. Co. v. Benson* (1890), 86 Ga. 203, 12 S. E. 357, 22 Am. St. 446. This doctrine of liability on the implied contract or conversion, applies not only where the carrier or tortfeasor has sold the goods wrongfully but also where he has used or consumed them, *or exercised any sort of unlawful dominion and control over them inconsistent with his duties as a carrier and adverse to the rights of the proper owner.* 15 Am. and Eng. Ency. Law (2d ed.) 1116b; *Wamsley v. Atlas Steamship Co., supra*; *Magnin v. Dinsmore* (1877), 70 N. Y. 410, 417, 26 Am. Rep. 608; *Bowlin v. Nye, supra*.

The act of the carrier in failing to deliver without lawful excuse may constitute a conversion, and the consignee after waiting a reasonable time and after demand, may bring his action therefor. *Baltimore, etc., R. Co. v. O'Donnell, supra*; *Clement v. New York, etc., R. Co., supra*; *Hamilton v. Chicago, etc., R. Co., supra*; 6 Cyc. 474. This court in the case of *Cleveland, etc., R. Co. v. Wright* (1900), 25 Ind. App. 525, 527, 58 N. E. 559, held "that evidence of a demand

and a failure to deliver would tend to prove a conversion, and, if unexplained, it would authorize a finding of conversion." We recognize that such demand and refusal are only evidence of a conversion where the defendant was in such condition that he might have delivered the property if he would, and if the undisputed evidence in this case was of such a character as to show that the property in question was lost or stolen, the authorities relied on by appellant would be controlling, but there is no affirmative evidence in this case showing either of such facts, or at least the evidence on this question was not of such a character as to justify this court in saying that the jury was bound to so find.

The evidence is undisputed that the appellant had possession of the property for delivery to the consignee on October 18, 1907. This possession is presumed to continue until the contrary is shown. *Adams v. Slate* (1882), 87 Ind. 573, 575; *Abbott v. Union Mut. Life Ins. Co.* (1890), 127 Ind. 70, 75, 26 N. E. 153; *Rush v. McGee* (1871), 36 Ind. 69.

This court cannot, under the evidence in the record, say that the jury did not have the right to infer that the appellant still had possession of the property when demand was made on it for the same. The only affirmative evidence upon this question is that relied on by appellant as tending to show a delivery to the consignee, and in determining whether the appellant did still have possession of the property when such demand was made upon it for the same, the jury had a right to take into account the evidence introduced before it, which showed or tended to show what became of the property after it went into appellant's possession. In determining whether the decision reached by the jury on this question had any evidence for its support, we should remember that there was some evidence showing or tending to show the following facts: The car in which this iron was loaded was an open Gondola car. There were fifty tons of iron made

up of bars weighing from 120 to 130 pounds each. The appellant's road and track was the only railroad track connecting with the Home Stove Company's private switch. No other railroad had access to such car while it was on the switch. The consignee was advised of the shipment of the car before its alleged arrival and some of its officers and employes were on the lookout for it. Such officers and employes, some of whom passed up and down the switch, six to a dozen times a day, claim they never saw the car either north or south of the gate, and one of such employes stated positively that such a car loaded with the kind of iron in question, was not on the switch on the days claimed by appellant. The consignee had no way of setting cars for unloading, and when they were set north of its gate, it had been its custom to require appellant to set and place such cars at the point desired for unloading. Appellant acquiesced in this custom and placed such cars. The appellant claims to have delivered the car loaded on October 18 and removed it empty on October 21. The 20th of the month was Sunday. There was no affirmative evidence of the loss or destruction of the car, and no one claims to have ever seen the car or any of its contents unloaded or removed, except, appellant claims to have removed the car empty. There is no evidence that the car in question was ever set or placed for unloading by appellant's agents. The conductor, who claimed to have delivered and placed the car loaded on the consignee's sidetrack north of its gate, admitted that he might not have seen the car delivered or placed on the switch; that he might have been somewhere else and entrusted the delivery of this particular car to the other trainmen. The same conductor was unable to say that when he removed the car empty, as he claimed, he got it at a point on the sidetrack where it would have been placed for unloading by the consignee, and was unable to say at what point on the sidetrack he got the car, or that he knew that the car was empty, except by his report. There

are statements in this conductor's evidence seemingly contradictory. He admits that he signed the initials of the consignee without authority to the receipt necessary to be turned in to his principal to show the delivery of the car. There was evidence tending to impeach appellant's record by which it attempted to show the delivery of the car loaded on the private switch of the stove company and the removal of the same car empty. From this evidence, the jury may have properly inferred that the appellant never in fact delivered the car *loaded* on appellant's private switch, or that if it did deliver it there loaded, it afterwards took it out in the same condition. Either inference, in view of the fact that a demand was afterwards made on appellant for such property, would, under the authorities cited in this and the prevailing opinion, authorize the verdict in this case.

NOTE.—Reported in 101 N. E. 114. See, also, under (1) 38 Cyc. 2007; (2) 6 Cyc. 472, 513; (3) 88 Cyc. 2087; (4) 3 Cyc. 388; (5) 35 Cyc. 164, 262, 539.

BAKER v. BUNDY.

[No. 8,064. Filed December 10, 1913.]

1. PLEADING.—*Demurrer to Answer.*—*Form.*—A demurrer to an answer on the ground that it does "not state facts sufficient to constitute an answer", does not present the question of the sufficiency of the facts stated to constitute a cause of defense. p. 276.
2. GUARDIAN AND WARD.—*Actions.*—*Complaint.*—*Theory.*—A complaint against the former guardian of plaintiff, alleging that defendant, father of the plaintiff, had in his hands as her guardian a certain sum for which he was accountable, that when plaintiff became of legal age defendant represented to her that he had not the money with which to make final settlement and that if she would sign a receipt for the money so that he could make and file his report he would deed her certain land to secure the payment of the amount due her, which he agreed to pay with interest on a reconveyance to him, that she assented to such arrangement and signed the receipt, that defendant filed his final report and

procured a discharge, but that he has not paid plaintiff, though plaintiff executed and tendered to him a deed of reconveyance and demanded payment, and alleging further that she brings such deed into court for defendant's use, and praying judgment for the sum named, although embracing facts consistent with the theory of a complaint to declare and enforce a trust, presents an action at law for the recovery of money, properly triable by jury. pp. 276, 277.

3. **TRUSTS.—Constructive Trusts.—Right of Beneficiary to Repudiate.—Actions.**—One whose money has been obtained by another under circumstances giving rise to a constructive trust may repudiate or ignore the trust and bring an action at law to recover the amount. p. 277.
4. **TRIAL.—Peremptory Instructions.**—A peremptory instruction should be given only where there is a total absence of evidence on some essential issue, or where there is no conflict in the evidence and the only inference that may be drawn therefrom favors the party asking the instruction. p. 278.
5. **GUARDIAN AND WARD.—Actions.—Trial.—Peremptory Instructions.**—In an action against plaintiff's former guardian to recover the amount due plaintiff on final settlement of the guardianship, the giving of a peremptory instruction to find for defendant cannot be sustained, where there was evidence tending to show that defendant at the time of making his report was chargeable with the sum claimed by plaintiff, that he was unable to and did not pay plaintiff and that he conveyed land to her as security for the amount, with the understanding that he would pay her in about five years on reconveyance of the land to him, nor can such instruction be justified on the theory that plaintiff's action was barred by the statute of limitations, in view of the fact that the action was on the contract and the statute had not run as against it, although an action based upon the default of the guardian at the time of making final report would have been barred. pp. 279, 281.
6. **GUARDIAN AND WARD.—Relation.—Expiration of Trust.**—The relation of guardian and ward is a continuing trust which expires by limitation of law when the ward arrives at the age of twenty-one years, except that under some circumstances it may be continued for purposes of settlement. p. 280.
7. **GUARDIAN AND WARD.—Majority of Ward.—Termination of Trust.—Relation.—Actions.—Statute of Limitations.**—On the arrival of a minor ward at the age of twenty-one years the relation of debtor and creditor arises as between himself and his guardian respecting any balance in the hands of the guardian unpaid and unaccounted for, giving the ward a right of action against the guardian personally without prior demand, and such

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an action is barred by the statute of limitations in six years after the ward becomes of age. p. 281.

From Wabash Circuit Court; *Francis E. Bowser*, Special Judge.

Action by Frances Bundy Baker against Camillus Bundy. From a judgment for defendant, the plaintiff appeals. *Reversed.*

J. T. Cox and *Claude Y. Andrews*, for appellant.

Carl J. Broo and *Overson & Manning*, for appellee.

CALDWELL, J.—This action was tried in the court below on appellant's fourth and fifth paragraphs of complaint. The facts averred in said fourth paragraph are in substance as follows: That appellee is the father of appellant, and on April 15, 1884, was appointed her guardian by the Wabash Circuit Court, she being a minor under the age of 21 years; that on February 23, 1899, said guardian had in his hands \$2,027.05, for which he as such guardian was accountable to appellant; that appellant became 21 years of age on January 3, 1899; that on May 23, 1899, said guardian filed his final report with said court, by which he showed that he had made full settlement with his said ward, and had paid her the full balance of said trust fund in said sum of \$2,027.05, and filed with said report, a receipt to that effect bearing appellant's signature; that appellant signed said receipt, but that said guardian at no time paid her said sum or any part thereof; that appellant had always lived in appellee's family, and had full confidence in him, and in his judgment, and had been taught to be obedient to him, and that in all business affairs she depended on appellee and was influenced and controlled by his judgment; that under such circumstances, appellee, preparatory to making and filing his said final report, represented to appellant that he had no money with which to pay her the balance due her under said guardianship, and that if appellant would sign a receipt to the effect that she had been paid

the said sum, and permit him to file said receipt with his said final report, he would deed to her 42 acres of land owned by him in Miami county, valued at \$1,000, as a pledge to secure the payment of said sum, and that on the reconveyance of said land to him, he would pay her in full with interest; that by reason of her said confidence in appellee and his influence over her, she signed said receipt, and permitted it to be filed with said final report, which said final report was filed and approved by the court on May 23, 1899, and appellee was thereupon discharged as such guardian; that appellee is indebted to her in said sum of \$2,027.05; that on March 30, 1903, appellee delivered to her a warranty deed, dated May 8, 1899, conveying said land to her, which deed she accepted and held under the terms of said agreement; that on October 3, 1905, appellant, at appellee's request, executed a mortgage on said land to secure a loan in the sum of \$300, the proceeds of which appellee received and retained; that appellee at all times used said lands as his own; that on April 7, 1909, appellant demanded of appellee that he pay her said sum of \$2,027.05, with interest, and tendered to him a deed reconveying said land to him, but that appellee refused to pay her said sum or any part thereof, and refused to accept said deed, which deed she brings into court for appellee's use; that there is due appellant from appellee said sum of \$2,027.05 and interest from March 22, 1899. The prayer of said paragraph is as follows: "Wherefore plaintiff sues and prays judgment against defendant in the sum of \$2,027.05, with interest at the rate of six per cent. per annum from the 22nd day of March, 1899, with costs, and all proper relief."

The fifth paragraph of complaint does not differ materially from the fourth paragraph. Appellee answered in five paragraphs, the first, a general denial; the second, full settlement and payment on May 20, 1899; the third, full settlement by the conveyance of said 42 acres of land, then worth more than \$2,027.05 and now worth \$1,400; fourth,

the three-year statute of limitations, which was filed under the provisions of §2925 Burns 1908, §2403 R. S. 1881; and fifth, the six-year statute of limitations. Appellant filed a separate demurrer to each of said affirmative paragraphs of answer, which was sustained as to the fourth paragraph and overruled as to the second, third and fifth. The appellant assigns error separately on the overruling of her demurrer to said second, third and fifth paragraphs respectively. Said demurrer is in the following form: "Plain-

1. tiff in the above entitled cause demurs separately and severally to each of the second, third, fourth and fifth paragraphs of defendant's answer, and for cause says said second, third, fourth and fifth paragraphs separately and severally do not state facts sufficient to constitute an answer to either the second, third, fourth or fifth paragraphs of plaintiff's complaint." A demurrer to a paragraph of answer drawn in such form does not present the question of the sufficiency of the facts stated in such paragraph to constitute a cause of defense. §351 Burns 1908, §346 R. S. 1881. *Wintrode v. Renbarger* (1898), 150 Ind. 556, 50 N. E. 570; *Thomas v. Goodwine* (1882), 88 Ind. 458; *City of Tell City v. Bielefeld* (1898), 20 Ind. App. 1, 49 N. E. 1090. The appellant replied in general denial to the second, third and fifth paragraphs of answer. The issues joined were submitted to a jury for trial. At the close of appellant's evidence, appellee moved the court to instruct the jury to return a verdict in his favor, which motion was sustained, and a peremptory instruction given, in harmony with which a verdict was returned for appellee. Judgment was rendered for costs against appellant, from which this appeal was taken.

Appellant, at the proper time, moved the court for a trial by the court, without the intervention of a jury, on the issue joined on said fourth paragraph of complaint,

2. and also requested of the court a special finding of facts and conclusions of law thereon. The motion

was overruled, and said request denied, and the court's rulings in said respects are properly presented for review. Appellant's contention is that the theory of the fourth paragraph of complaint is the declaration and enforcement of a constructive trust, and that the fourth paragraph therefore presents an issue in equity, triable by the court, and that as a consequence, the court erred in overruling said motion and in denying the request. If appellant properly construes said paragraph, then the issue joined thereon should have been tried by the court, without a jury, and the court erred in each of the particulars asserted. It is evident that many of the facts averred in the fourth paragraph of complaint might very properly be embodied in a complaint, the theory and purpose of which was to declare and enforce a trust, and that such facts would tend to support such a complaint. Such, however, is not the theory of the fourth paragraph. It does not proceed to the end that any particular fund or property may be impressed with a trust, and such trust enforced, or that a fund be traced through changing forms and investments, and that it be subjected to equity when and where found and identified. In short, no appeal is made distinctively to equity or for the application of distinctively equitable principles. Granting that the facts

averred with other facts might be sufficient to give

3. rise to a trust, still appellant, as the beneficiary of such trust, had a right to repudiate or ignore the trust and sue at law for the amount of money due

2. her. *Jefferson School Tp. v. School Town, etc.*

(1892), 5 Ind. App. 586, 588, 32 N. E. 807; 2 Perry, *Trusts* (6th ed.) §828. See also *Parks v. Satterthwaite* (1892), 132 Ind. 411, 415, 32 N. E. 82; *Thomas v. Merry* (1888), 113 Ind. 83, 15 N. E. 244; *Talbott v. Barber* (1894), 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. 491; *Mohn v. Mohn* (1887), 112 Ind. 285, 13 N. E. 859; *Hon v. Hon* (1880), 70 Ind. 135. The case made by said fourth paragraph of complaint is at law for the recovery of money, and it, there-

fore, follows that the court did not err in overruling said motion or denying said request.

The question is presented whether the court erred in instructing the jury peremptorily to return a verdict for appellee, which question we proceed to consider.

4. The rules that guide us here are, that such an instruction should be given only where there is a total absence of evidence on some essential issue, or "where there is no conflict, and the evidence is susceptible of but one inference, and that inference is favorable to the party asking the instruction." *Lyons v. City of New Albany* (1913), 54 Ind. App. 416, 103 N. E. 20. "Upon a motion for a peremptory instruction, the court is bound to accept as true all facts which the evidence tends to prove, and to draw, against a party requesting such instruction, all inferences which the jury might reasonably draw, and, in case of conflict in the evidence, to consider only that favorable to the party against whom the instruction is asked, that favorable to the other party being treated as withdrawn." *Roberts v. Terre Haute Electric Co.* (1906), 37 Ind. App. 664, 671, 76 N. E. 323, 895. If in any given case the evidence is oral rather than documentary, and if it is uncertain or equivocal in its character rather than conflicting, or if it is reasonably susceptible of two interpretations, one tending to support the claims of one party and the other tending to support the claims of the other party, it is within the province of the jury to weigh and construe the evidence and solve the uncertainty, and in such case the court should not direct the verdict. *Cincinnati, etc., R. Co. v. Darling* (1892), 130 Ind. 376, 30 N. E. 416; *Annadall v. Union Cement, etc., Co.* (1905), 165 Ind. 110, 74 N. E. 893; *Gasset v. Glazier* (1896), 43 N. E. (Mass.) 193; *Patten v. Pancoast* (1888), 109 N. Y. 625; *Merkle v. Moore* (1890), 134 Pa. St. 608, 19 Atl. 801; *Brown v. Orland* (1853), 36 Me. 376; *Beebe v. Koshnic* (1885), 55 Mich. 604, 22 N. W. 59; 9 Cyc. 592, 786.

There was evidence to the effect that appellee as guardian

of appellant filed his final report in the Wabash Circuit Court on May 20, 1899, showing a balance due appellant of \$2,027.05. By said report, he took credit for said sum as paid appellant, and filed with said report a receipt signed by appellant to that effect. Said report was approved and appellee discharged. Appellant became 21 years of age January 3, 1899. Appellant is a daughter of appellee. There was some evidence that preparatory to making said final settlement, appellee said to appellant in substance that he did not have the money to pay her; and that he wanted her to be easy with him, and that if she would permit him to keep the money, he would deed her the 42-acre tract of land; that he did not mean for her to keep the land, but that in about five years he would pay her, and she could then deed the land back to him. There was some evidence that his promise was to pay her when he was able, and that he thought he would be able in about five years, to all of which appellant agreed. There was evidence tending to show that appellee exercised great control and influence over appellant, and that she was always obedient to his commands and requests. Appellee cautioned appellant to say to the attorney who prepared the final report, and to the circuit judge that she was satisfied with the settlement, and she did so state to them. Appellant agreed to and did sign the receipt under the circumstances aforesaid, and agreed to accept a deed to said land. Appellee paid her no money. The deed was delivered to her two or three years later, after repeated demands for it. Appellee retained control of the land and received all rents and profits from it. He procured appellant to execute a mortgage on the land to secure a loan of \$300, which he appropriated to his own use. Appellant remained at her father's home about one year after he was discharged as guardian, and then went to Peru to work, and three or four years later first asked appellee to pay her said claim. Several witnesses testified to statements made by appellee to the effect that he

had deeded the land to appellant to secure her, and that he expected to pay her and get the land back. Such statements were made at various times from soon after he was discharged as guardian, to shortly before the trial of the cause. A number of witnesses testified, without contradiction, that said lands were worth from twelve to fifteen dollars per acre in 1899. Suit was commenced in April, 1909. From the foregoing, it appears that there was evidence tending to show that when appellee filed his said final report, he had in his hands \$2,027.05 of appellant's money, and that no part of it was at any time paid her in money; that the land conveyed was worth very much less than the said amount of money due. Said admissions made by appellee, taken with said conversation had between the parties shortly before appellee filed said final report, constitute at least some evidence that appellee was indebted to appellant and that said land was conveyed to secure said indebtedness. There was some evidence also that by the terms of the agreement between the parties, the money was to be paid in about five years, that is, in consideration of appellee conveying said land as security, and a promise to pay in about five years, appellant agreed that he might retain the money.

The theory of the complaint having been determined, appellee assigns two reasons in justification of the giving of said peremptory instruction: (1) That the evidence is conflicting and uncertain; (2) that it shows appellant's cause of action to be barred by the statute of limitations. We have disposed of the first reason to the effect that when the evidence is conflicting and uncertain, the issue involved should be submitted to the jury for determination. We pro-

ceed to consider the second reason. The relation of

6. guardian and ward is a continuing trust. When the ward arrives at the age of 21 years, such trust expires by limitation of law, except that under some circumstances it may be said to continue for purposes of settlement. *Stroup v. State, ex rel.* (1880), 70 Ind. 495, 498; *Jones v. Jones*

(1883), 91 Ind. 378, 380; *Spicer v. Hockman* (1880), 72 Ind. 120, 125; *Hays v. Walker* (1883), 90 Ind. 105. There-

upon, on the arrival of the ward at full age, the rela-

7. tion of debtor and creditor arises between the guardian and ward respecting any balance in the hands of the guardian unpaid and unaccounted for, which balance as a debt is then due, and to recover which, such ward may maintain an action against such guardian personally, without having made a prior demand for its payment. *Lambert v. Billheimer* (1890), 125 Ind. 519, 25 N. E. 451; *Jones v. Jones, supra*; *Hays v. Walker, supra*. Such a cause of action is barred by the statute of limitations in six years after the ward becomes of age. *State, ex rel. v. Parsons* (1897), 147 Ind. 579, 583, 47 N. E. 17, 62 Am. St. 432; *Lambert v. Billheimer, supra*; *Peel v. State, ex rel.* (1889), 118

Ind. 512, 21 N. E. 288. In the case at bar, under

5. the foregoing authorities, an action by appellant to recover from appellee the balance due her would have been barred by the statute in six years after she arrived at full age, had there been no new contract or arrangement between them. But, as we have shown, there was evidence to the effect that shortly after appellant became 21 years of age, such a new contract or arrangement was entered into by the parties, by the terms of which appellant agreed that appellee might retain said balance, and that she would execute said receipt in order that appellee might use the same in making his final settlement, in consideration of which appellee in his individual capacity agreed to pay appellant said balance and to execute said deed as security for the performance of his said agreement. Such contract was fully carried out except as to the payment of the money by appellee. We do not regard it as necessary to discuss the proposition of whether a ward may maintain an action against her guardian or on his bond, to recover a balance due and shown paid by a final settlement report, where said report has been approved and the guardian discharged, without

first, by an appropriate action causing such approval to be set aside. Here the action is not based on such a report, or on any transactions had prior to it, but rather it is based on said new contract. The action is not inconsistent with the fact that there has been such an approved final settlement. In legal effect, the situation is not different from what it would have been, had appellee actually paid appellant said sum due her, and thereafter borrowed it of her, under a promise to repay her. In either the real case or the supposed case, had appellee executed to appellant a promissory note representing said sum due her, it is plain that a seasonable action could have been maintained on said note in case of default in its payment. If it be true that an action could have been maintained on the note, it seems evident that an action can likewise be maintained on the parol promise. However, appellee, at least by implication, concedes the right to maintain the action, in that he advances no reason why it cannot be maintained, were it not, as he insists, barred by the statute. Nevertheless, we feel that our discussion is warranted in order that we may emphasize the fact that the action is based on the new contract. The following authorities tend to support our conclusion. *Lindsay v. Lindsay* (1875), 28 Ohio St. 157; *Thorndyke v. Hinckley* (1892), 155 Mass. 263, 29 N. E. 579; *Beedle v. State, ex rel.* (1878), 62 Ind. 26; *Taylor v. Calvert* (1894), 138 Ind. 67, 37 N. E. 531.

As we have shown, there was evidence to the effect that by the terms of such contract, appellee agreed to pay said sum to appellant in about five years, and other evidence that he would pay it when he was able, and that he thought he would be able in about five years. The action being based on the new contract is not barred by the statute, unless six years elapsed between the accrual of the action and its commencement. If said peremptory instruction had not been given, and if the trial had been permitted to proceed in due course, the jury might have found from the evidence

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that appellee's promise was to pay in five years with a reserved right to pay sooner. If such was appellee's contract, the cause of action did not accrue until May, 1904, and if this suit was commenced in April, 1909, the action was not barred. If it be true that on the issue of the statute of limitations, the evidence was contradictory or uncertain or equivocal, still, there being some evidence, the jury should have been permitted to determine what, if anything, it proved. We express no opinion respecting the strength or weakness of the evidence. It is within the province of the court to decide whether there is any evidence, but it is for the jury to determine as to its sufficiency. The court erred in giving said peremptory instruction, for which error the judgment should be reversed.

The judgment is reversed, with instructions to sustain the motion for a new trial.

NOTE.—Reported in 103 N. E. 668. As to effect on statute of limitations of acknowledgment or new promise, see 62 Am. Dec. 101; 102 Am. St. 751. See, also, under (1) 31 Cyc. 319; (3) 39 Cyc. 533; (4) 38 Cyc. 1533, 1565; (5) 21 Cyc. 187, 198; (6) 21 Cyc. 50; (7) 21 Cyc. 199.

WHEATCRAFT v. WHEATCRAFT ET AL.

[No. 8,008. Filed June 6, 1913. Rehearing denied October 28, 1913.
Transfer denied December 19, 1913.]

1. TRUSTS.—*Action to Remove Trustee.—Jurisdiction.*—A petition merely seeking the removal of a trustee, resident of a county other than that in which the trust estate is situate, and showing that the real estate in which the trust was created is situate in the county where the petition was filed, and that the deed was recorded in such county, brings the proceeding within the general rule giving jurisdiction of a trust to the circuit court of the county in which it was created. p. 286.
2. PLEADING.—*Complaint.—Parties.*—A complaint in which more than one plaintiff joins must state a cause of action in favor of all the parties joining therein to be sufficient against a demurrer for want of facts. p. 287.
3. TRUSTS.—*Construction of Trust Deed.*—"Child".—"Children".—Although *prima facie* the word "child" or "children" when used

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in a statute or will means legitimate child or children, where it appears that at the time of creating a trust in real estate in favor of grantor's daughter, with remainder to the child or children of such daughter, such daughter was unmarried and had a child then in being, it must be presumed that the deed was made with reference to the existence of such child. p. 287.

4. TRUSTS.—*Action to Remove Trustee.—Complaint.—Parties.—Joinder of Remainderman and Cestui Que Trust.*—A complaint, in which the cestui que trust and the remainderman joined as plaintiffs, seeking the removal of the trustee, and which disclosed that the cestui was to receive the rents and profits of the estate annually during life and that at her death the trust should terminate and the real estate should go to such remainderman, sufficiently showed an interest entitling the latter to join as plaintiff. p. 288.

5. REMAINDERS.—*Vesting of Estate.*—The law favors the vesting of remainders at the earliest possible moment. p. 288.

6. TRUSTS.—*Action to Remove Trustee.—Grounds.—Interest of Remainderman.*—Where the only purpose of an action was the removal of a trustee on account of a breach of his trust, both the cestui que trust and the remainderman, being interested in the faithful performance of the trust, were properly joined as plaintiffs, in view of §4023 Burns 1908, §2980 R. S. 1881, providing that trustees may be removed for the violation or attempted violation of any express trust, or for other causes, on petition of any person interested, and the complaint was not insufficient, although the causes assigned for removal did not directly affect or harm such remainderman. p. 288.

7. TRUSTS.—*Removal of Trustee.—Grounds.—Complaint.*—While not every violation of duty or mismanagement on the part of a trustee will necessitate his removal, especially if the trust fund is not thereby endangered, under §4023 Burns 1908, §2980 R. S. 1881, providing for the removal of trustees, a breach of the trust is sufficient ground for removal if it endangers or impairs the trust fund; hence a complaint seeking the removal of a trustee for the reason that he had not annually paid over to the cestui que trust the rents and profits of the estate as provided in the trust deed was sufficient to meet the requirements of the statute. p. 290.

From Marion Circuit Court (18,901); *Charles Remster*. Judge.

Action by Fannie E. Wheatcraft and another against Harvey H. Wheatcraft. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

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J. F. Crawford and *E. A. McAlpin*, for appellant.

L. Ert Slack, for appellees.

HOTTEL, P. J.—On March 10, 1904, Eliza J. McAlpin, then the owner in fee simple of four separate tracts of real estate aggregating about eighty-one acres situated in Marion County, Indiana, conveyed and quitclaimed it to the appellant Harvey H. Wheatcraft of Johnson County, Indiana, as trustee. The provisions of the trust created by such deed are as follows:

“This indenture Witnesseth, that Henry Alexander McAlpin and Eliza J. McAlpin, his wife, of Marion County, and State of Indiana, convey and quitclaim, to Harvey H. Wheatcraft, of Johnson County and State of Indiana, as trustee, for the sum of One Dollar, the following Real Estate, in Marion County, Indiana, to wit: (Here follows description.) Said Harvey H. Wheatcraft, is to have and to hold said real estate, however, in trust for the following purposes, to wit: Said trustee is to manage and control said real estate for and during the natural life of Fannie E. Wheatcraft, daughter of said Eliza J. McAlpin, and is to account to and to pay over to said Fannie E. Wheatcraft during her natural life the net rents and profits of said real estate annually, said trustee to keep said property in good repair and to pay all taxes and other liens thereon. At the death of said Fannie E. Wheatcraft, said trust is to terminate and said real estate is to go to the child or children of said Fannie E. Wheatcraft then living and to the descendants of such as are dead, the descendants of any deceased child taking the same interest the parent would have taken if alive. This conveyance is made subject to a life estate in and to the above described real estate in the said Eliza J. McAlpin, which is hereby reserved from this conveyance, and she is to have the possession and control thereof during her natural life. The said child or children above mentioned to take as purchasers under this deed.”

Appellee Fannie E. Wheatcraft, at the time of the execution of such deed, was unmarried, and was the only child of the grantor. Appellee Grace Wheatcraft was then in life and was the only child of said Fannie. In March, 1905,

Eliza J. McAlpin died intestate leaving said Fannie as her only child and heir. On April 24, 1905, the trust deed was recorded in deed record — in Marion County, Indiana. On December 18, 1909, Grace Wheatcraft was married to David R. Tilton, and on March 23, 1910, she and her mother Fannie joined in a petition filed in the Marion Circuit Court in which they, for the reasons therein set forth, asked a removal of the trustee. To this petition appellant filed a verified plea in abatement in which he alleged that he was then, and for more than twenty years prior thereto, had been, a resident of Johnson County, Indiana. To this plea a demurrer for want of facts was sustained and such ruling is assigned and relied on as error. A demurrer to the complaint and separate demurrers to each of the several grounds for removal, Nos. 2, 3, 4, 5, 6, 8, 11 and 12 were each overruled, and to each ruling appellant saved proper exceptions. These rulings are also assigned as error, and relied on for reversal. An answer in denial, three paragraphs of affirmative answer and a reply in denial closed the issues. There was a trial, and a general finding for appellees and that appellant be removed. A motion for new trial was overruled and this ruling is assigned and relied on as error.

The question presented by the ruling on the demurrer to the plea in abatement, requires us to determine whether the place of residence of the trustee controls the ques-

1. tion of jurisdiction in such cases. The real estate in which the trust was created and over which the trustee, as such, was to exercise management and control was in Marion County. The deed creating the trust was recorded in Marion County. The petition sought the removal of the trustee and nothing more. It did not ask a personal judgment against appellant and tendered no issue that in any way affected his person or property, but sought only to relieve the trust estate of appellant's management and control. The facts averred in the petition and the relief sought therein bring it within the general rule which

gives jurisdiction of a trust to a circuit court of the county in which it is created. §§4023, 4039, 4040 Burns 1908, §§2980, 2996, 2997 R. S. 1881; *Thiebaud v. Dufour* (1876), 54 Ind. 320, 327; *Tucker v. State, ex rel.* (1880), 72 Ind. 242, 246; *Hinds v. Hinds* (1882), 85 Ind. 312, 316; *Premier Steel Co. v. Yandes* (1894), 139 Ind. 307, 316, 38 N. E. 849. It is urged against the complaint that it does not state facts sufficient to constitute a cause of action in favor of appellee Grace Tilton, and that for this reason the demurrer thereto should have been sustained. Appellant's contention

2. that a complaint in which more than one plaintiff joins must state a cause of action in favor of all the parties joining therein to make it sufficient against a demurrer for want of facts is supported by authority. *Darkies v. Bellows* (1884), 94 Ind. 64, 66; *Holzman v. Hibben* (1885), 100 Ind. 338, 339, 340; *McIntosh v. Zaring* (1898), 150 Ind. 301, 313, 49 N. E. 164, and authorities there cited; *Swales v. Grubbs* (1893), 6 Ind. App. 477, 480, 33 N. E.

1124. It is insisted that the complaint shows that

3. Fannie E. Wheatcraft was unmarried and that the words "child" or "children" as used in the deed here involved means the legitimate child or children of said Fannie, and that the complaint therefore shows upon its fact that Grace Tilton has no interest in the trust involved, and hence no cause of action was stated in her favor. "It is a rule of construction that *prima facie* the word child or children when used either in a statute or will, means legitimate child or children." *McDonald v. Pittsburgh, etc., R. Co.* (1896), 144 Ind. 459, 461, 43 N. E. 447, 55 Am. St. 185, 32 L. R. A. 309. See, also, *Jackson v. Hocke* (1908), 171 Ind. 371, 373, 84 N. E. 830, and authorities there cited. In the complaint before us, however, it appears by necessary inference, that Grace Tilton was in being when Eliza J. McAlpin made the deed in question, and was the only child of said Fannie E. Wheatcraft in being at that time. Mrs. McAlpin having made the deed in question after the birth

of her grandchild, Grace, she will be presumed to have made it with reference to the existence of such grandchild.

It is further insisted by appellant that by the terms of the deed in question, the appellee, Grace, at the time of the filing of the petition herein, had no vested interest

4. in the remainder in the fee but only a contingent remainder therein, and that for this reason the complaint fails to show a cause of action in her. The

5. law favors the vesting of remainders at the earliest possible moment; *Myers v. Carney* (1908), 171 Ind. 379, 84 N. E. 400, and authorities there cited; but whether, by the provisions of the deed in question, the interest of appellee Grace in the real estate be treated as vested, or contingent only, the complaint shows that she had such an interest in the subject of the action as entitled her, under §263 Burns 1908, §262 R. S. 1881, to join as a plaintiff.

It is urged against the ruling on the separate demurrers to the several grounds alleged for the removal of the trustee that neither of them shows any cause for removal in

6. favor of Grace Tilton and that therefore the separate demurrer to such grounds should have been sustained.

This contention is especially made with reference to grounds two and three. These grounds are as follows: "2. He has not paid to Fannie Wheatcraft the rents 'of said real estate annually, as provided in said deed of trust.' 3. He has not accounted to Fannie Wheatcraft 'for the net rents and profits of said real estate annually as provided in said deed of trust.' " Assuming without deciding that appellant is correct in his contention that these several grounds for removal should be treated as separate paragraphs of a complaint and that each ground should be sufficient as to each plaintiff, we must determine whether the respective grounds stated, afford a cause of removal in favor of Grace Tilton. It is true in a sense that such appellee was not directly

harmed by appellant's failure to account to her coappellee, the life tenant, for the annual rents and profits of the real estate, but we must not lose sight of the nature and character of the action here involved. The only purpose of the action is the removal of the trustee on account of a breach of his trust. Section 4023 Burns 1908, *supra*, provides as follows: "Trustees having *violated or attempted to violate* any express trust, or becoming insolvent; or of whose solvency or that of their sureties there is reasonable doubt, *or for other cause in the discretion of a court having jurisdiction, may, on petition of any person interested*, after hearing, be removed by such court, and all vacancies in express trusteeships may be filled by such court." (Our italics). Both the life tenant and the remainderman are interested in a faithful performance of the trust, and the proper management and preservation of the trust estate, and we are of the opinion that the section of statute just quoted, authorizes a joint ground for removal, which shows a breach of the trust by the trustee which injuriously affected one *cestui que trust* alone, and if such breach be a sufficient cause for removal by such *cestui que trust*, it will inure to the benefit of his copetitioners and be treated as a sufficient ground of removal in favor of them. It must be remembered that it is the breach of the duty, and its effect on the trust estate, and not the extent of its effect on any one *cestui que trust*, that furnishes the cause of action or ground of removal, and such removal by one, necessarily operates as a removal for all. For these reasons we think any *cestui que trust* may join with another *cestui que trust* whose interest is not adverse, in a petition to remove the trustee and they may jointly allege any violation of duty by the trustee which furnishes sufficient ground for his removal, though such violation may have directly affected one only of the parties joining. Of course, in an action to recover damages resulting from the violation of the duty, an

entirely different question would be presented. In support of our conclusion on this question see, *Gartside v. Gartside* (1892), 113 Mo. 348, 358.

Finally it is insisted in effect that the complaint, and each of the grounds thereof, fails to state a cause of action

in favor of either of the appellees because the trust

7. estate is not shown to be in jeopardy, and no "actual

dishonesty or incompetency on the part of appellant"

is shown. It is true, as appellant contends, that it is not every violation of duty or mismanagement on the part of the trustee that will necessitate his removal, especially where the trust fund is in no danger of being lost on account of such breach of duty. 1 Perry, Trusts (5th ed.) §276; 28 Am. and Eng. Ency. Law (2d ed.) 979. It seems clear, however, under our statute and from all the decisions, that if the breach of the trust relied on, endangers or impairs the trust fund it will furnish a sufficient ground for removal. 28 Am. and Eng. Ency. Law (2d ed.) 978, 979; *Grand Rapids etc., R. Co. v. Cox* (1893), 8 Ind. App. 29, 35 N. E. 183, and authorities there cited; *North Carolina R. Co. v. Wilson* (1879), 81 N. C. 223, 230. The use of the trust estate by the trustee for his own benefit or any neglect or mismanagement which impairs or jeopardizes such estate will furnish sufficient ground for removal. 28 Am. and Eng. Ency. Law *supra*; *Gartside v. Gartside*, *supra*; *North Carolina R. Co. v. Wilson*, *supra*, 230; *Piper's Appeal* (1852), 20 Pa. St. 67; *Wilson v. Wilson* (1888), 145 Mass. 490, 14 N. E. 521, 1 Am. St. 477; §4023 Burns 1908, *supra*. The complaint and the several grounds for removal therein stated to which a demurrer was overruled, fully meet the requirements of the decisions cited, and the principles of law announced therein.

The only grounds of the motion for new trial discussed in appellant's brief are those alleging that the decision is contrary to law, and that it is not sustained by sufficient evidence. Practically the same questions are raised that we have already discussed in connection with the complaint,

and no necessity is indicated for their further discussion in this connection. There is evidence tending at least to support several if not all the grounds for removal to which the demurrer was overruled. We find no error in the record. Judgment affirmed.

NOTE.—Reported in 102 N. E. 42. See, also, under (1) 39 Cyc. 265; (2) 31 Cyc. 103; (3) 39 Cyc. 198; 40 Cyc. 1451; (4) 39 Cyc. 268; (7) 39 Cyc. 261, 264.

INDIANA LIFE ENDOWMENT COMPANY v. PATTERSON.

[No. 8,049. Filed January 6, 1914.]

1. PLEADING.—*Complaint.—Waiver of Conditions Precedent.—Sufficiency of Averments.*—Under §376 Burns 1908, §376 R. S. 1881, relating to pleading the performance of conditions precedent contained in a contract sued on, the general averment that all the conditions precedent had been performed before the bringing of the action is sufficient, but if the general averment is not relied on, the acts constituting the performance must be set out with particularity, and if a waiver is charged the facts constituting the waiver must be set out. p. 295.
2. INSURANCE.—*Action on Policy.—Waiver of Conditions Precedent.—Complaint.—Harmless Error.*—Where the complaint on an insurance policy, to recover the benefits therein provided on account of permanent disability from injuries, charged a waiver of the sufficiency of the proof of injury and disability, which was a condition precedent, without averring the facts constituting the waiver, the overruling of a demurrer thereto, if erroneous by reason of such defect, was harmless, where it appeared from the whole record that such was the only condition presented to the jury as having been waived, that proof was heard upon the question, and that the finding of the jury was against the claim of defendant that the condition had not been waived and that there had been no sufficient compliance therewith. p. 295.
3. INSURANCE.—*Action on Policy.—Complaint.—Averments of Total and Permanent Disability.*—In an action on a policy of insurance to recover disability benefits under a provision therein, which has been judicially construed to mean that the insured is entitled to payment in case he becomes totally and permanently disabled from following any occupation or engaging in any business from which he may by reasonable efforts obtain a livelihood, a complaint charging that plaintiff's injury was total and permanent,

that he was totally and permanently disabled from performing any and all kinds of manual labor or business upon which he depended for a livelihood, and that he was totally and permanently disabled from following his usual occupation and from performing any kind of manual labor whatever, sufficiently averred that the disability was total and permanent within the meaning of the policy. p. 296.

4. **INSURANCE.—Action on Policy.—Total and Permanent Disability.—Jury Question.—Conclusiveness of Verdict.**—In an action to recover on the total and permanent disability clause contained in a policy of insurance, the question of whether the disability of the plaintiff is total and permanent within the meaning of the policy is for the court or jury to determine from all the evidence in the cause, hence where there was sufficient evidence to warrant the conclusion that the proof of loss furnished by plaintiff was sufficient, the verdict for plaintiff is conclusive. p. 297.

From Warrick Circuit Court; *Roscoe Kiper*, Judge.

Action by John W. Patterson against the Indiana Life Endowment Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

William D. Hardy and *Robinson & Stilwell*, for appellant.

R. W. Armstrong and *Frank H. Hatfield*, for appellee.

SHEA, J.—Appellee brought this action against appellant on an insurance policy to recover judgment for money claimed to be due him under the provisions of the policy for the payment of total and permanent disability benefits. Two paragraphs of complaint were filed, and a demurrer to each paragraph was overruled. An answer in general denial formed the issues submitted to a jury for trial. Judgment was rendered for appellee in the sum of \$371.55.

The errors assigned for a reversal are the overruling of appellant's demurrer to each paragraph of the complaint, and the overruling of its motion for a new trial.

The first paragraph of complaint alleges substantially the following: Appellant is a corporation organized under the laws of Indiana, engaged in the business of insuring persons against death and injury by accident, and conducting its

business in the city of Evansville, Indiana. On October 23, 1907, at the town of Milltown, in Crawford County, Indiana, appellant, in consideration of the warranties contained in the application and a premium of two dollars per month, insured appellee against accident of any kind. By the terms of the policy, appellant promised to pay appellee's wife, the beneficiary named, in case of his death and satisfactory proofs thereof, the sum of \$100 for emergency expenses, and thereafter \$30 monthly on the first day of each month during her natural life until married, not to exceed the amount of the policy, \$4,000; and obligated itself and agreed to pay appellee, in "the event that he became totally and permanently disabled from performing any and all kind of manual labor or business upon which he may depend for a livelihood", upon receipt of satisfactory proof of such injury, the sum of \$30 per month so long as he lived, not to exceed \$4,000. A copy of the policy is made a part of the complaint by exhibit. At the time of making application for insurance, and the issuing of the policy, appellee was a bridge carpenter, upon which business he depended for a livelihood, and these facts he made known to appellant at that time. On February 6, 1909, while the policy was in full force and effect, appellee received a severe personal injury by reason of a platform on which he was performing his work of adzing crossties, giving way, whereby he was thrown to the ground with great force and violence, and said crossties falling on him, bruised and mangled his body, and dislocated and tore his left shoulder from its socket; that his shoulder is still dislocated, and appellee was "thereby totally and permanently disabled from performing any and all kinds of manual labor or business upon which he depended for a livelihood; * * * that by reason of his said injury and accident he was and still is totally and permanently disabled from performing any and all kinds of manual labor or business upon which he depended for a livelihood and is totally and permanently

disabled from performing any and all kinds of manual labor of any kind whatever and that plaintiff has been and still is totally and permanently disabled from performing any and all kinds of manual labor or business in connection with his occupation as a bridge carpenter; • • • that since said accident and injury to plaintiff he has been unable to perform any kind of manual labor or perform any labor as a bridge carpenter, and has thereby been deprived of earning a livelihood by reason of said accident and injury;” that he has duly performed all of the conditions of the policy to be by him performed before the bringing of this action, and immediately upon receipt of his injury and before commencement of this action gave appellant due and legal notice and proof of his injury; “that said injury was such that plaintiff was totally and permanently disabled from performing any and all kinds of manual labor or business upon which he depended for a livelihood and was totally and permanently disabled from performing any kind of manual labor whatever.” Appellee has repeatedly demanded settlement and payment, which demands appellant has wholly ignored, and has failed and refused to make settlement. Judgment for \$4,000 and interest and all other proper relief is demanded.

The second paragraph of complaint is in the same language as the first, except that it contains an allegation of performance on appellee's part of all conditions precedent, except such as were waived by appellant. The second paragraph of complaint is especially challenged by appellant because of the following averments: (1) “Plaintiff further avers that he has fully and duly performed all the conditions of said policy by him to be performed before the bringing of this action, except such conditions as were waived by the defendant.” (2) “That said injury was total and permanent and that he gave defendant due and legal notice before the commencement of this action; that his said injury was such that plaintiff was totally and permanently disabled

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from performing any and all kinds of manual labor or business upon which he depended for a livelihood and was totally and permanently disabled from performing any kind of manual labor whatever.”

It is insisted that the first averment is insufficient because the particular acts constituting the waiver charged, should have been specifically set out. In support of this

1. doctrine, appellant cites and relies upon *Smith v. Brown* (1854), 17 Barb. (N. Y.) 431, and *Read v. Cisney* (1823), 4 Litt. (Ky.) *137. In the case of *Smith v. Brown, supra*, after a general averment in the complaint of conditions performed, this language is found: “in every respect, except wherein the same were afterwards waived and altered from said written agreements, by the direction, consent or negligence and fault of the said defendants.” The court held that this averment rendered the complaint bad. Section 376 Burns 1908, §376 R. S. 1881, provides that the general averment, that all the conditions precedent had been performed before the bringing of the action, is sufficient, but if the general averment is not relied on, the acts constituting the performance must be set out with particularity. *American Cent. Ins. Co. v. Sweetser* (1888), 116 Ind. 370, 19 N. E. 159; *National Benefit Assn. v. Bowman* (1887), 110 Ind. 355, 11 N. E. 316; *Hanover Fire Ins. Co. v. Johnson* (1901), 26 Ind. App. 122, 57 N. E. 277. In the case of *Magic Packing Co. v. Stone-Ordean, etc., Co.* (1902), 158 Ind. 538, 64 N. E. 11, it is held that “it must be alleged, as to conditions precedent, that the party seeking to enforce the same has complied with all such conditions of said contract on his part * * * or state facts showing a proper excuse for not doing so.” It is also held in *Grand Lodge, etc. v. Hall* (1903), 31 Ind. App. 107, 108, 67 N. E. 272, that if a waiver be charged in the complaint, the facts constituting the waiver must be set out. It can not be
2. said that this paragraph of complaint measures up technically to the rule herein laid down. The com-

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plaint does charge, however, that there was a waiver of the sufficiency of the proof of injury and disability, which was a condition precedent. An examination of the whole record discloses the fact that this was the only condition which was presented to the jury as having been waived, or held to have been insufficiently complied with. Proof was heard upon the question without objection, and the finding of the jury was against appellant's contention; therefore, if it was error to overrule the demurrer to the complaint, no harm resulted to appellant on that account, and the cause will not be reversed for that reason, under the familiar rule of both this court and the Supreme Court. *Vulcan Iron, etc., Co. v. Electro, etc., Min. Co.* (1913), 54 Ind. App. 28, 99 N. E. 429, 100 N. E. 307, and cases there cited; *Brawfordsville Trust Co. v. Ramsey* (1912), 178 Ind. 258, 8 N. E. 177.

The second objection to this paragraph of complaint is equally untenable, as viewed by the court. In the case of

Indiana Life, etc., Co. v. Reed (1913), 54 Ind. App.

3. 450, 466, 103 N. E. 77, in construing a policy issued

by the same company and identical in its language with the one here considered, the court says: "When so construed, the policy issued to appellee means that in case he insured becomes totally and permanently disabled from following any occupation or engaging in any business from which he may by reasonable effort obtain a livelihood, he is entitled to payment as stipulated in the policy." The language of the complaint in the case at bar is that appellee's injury was total and permanent; that he was totally and permanently disabled from performing any and all kinds of manual labor or business upon which he depended for a livelihood and was totally and permanently disabled from performing any kind of manual labor whatever; that he was also permanently disabled from following his usual occupation. The averments fairly construed, are sufficient, and no error was committed in overruling the demurrer to

the second paragraph of complaint. *Indiana Life, etc., Co. v. Reed, supra*, and authorities cited.

The objection to the first paragraph is that the averments of total disability were insufficient. The first paragraph is not set out in appellant's brief, but was supplied by appellee in his brief, and an examination discloses that it is identical in its allegations with the second, except with respect to the question of waiver, so what we have said regarding the allegation of disability contained in the second paragraph, applies to the first paragraph. It follows that the demurrer to that paragraph was rightly overruled. *Indiana Life, etc., Co. v. Reed, supra*.

Under its motion for a new trial appellant sets out: (1) The evidence wholly failed to show "total and permanent disability"; (2) The evidence wholly failed to show 4. proof of "total and permanent disability", or waiver of such proof; (3) The evidence wholly failed to establish "total and permanent disability" within the provisions of the policy. In the case of *Indiana Life, etc., Co. v. Reed, supra*, the injury was the loss of an arm, and it was held that the question whether the insured was totally and permanently disabled so as to prevent him from earning a livelihood by any kind of service within the meaning of the policy, was a question of fact for the court or jury, to be determined from all the evidence in the case. There was evidence introduced sufficient to warrant the court and jury in concluding that the proof of loss furnished by appellee was sufficient. This court will not disturb the verdict on the weight of the evidence. The finding in *Indiana Life, etc., Co. v. Reed, supra*, is decisive of the questions here involved upon appellant's contention under its motion for a new trial.

We find no error in the record which warrants a reversal of this cause. Judgment affirmed.

NOTE.—Reported in 103 N. E. 817. As to what constitutes total disability, generally, see 38 L. R. A. 529; 23 L. R. A. (N. S.) 352;

29 L. R. A. (N. S.) 635; 34 L. R. A. (N. S.) 126. See, also, under (1) 31 Cyc. 107, 108; (2) 31 Cyc. 358; (3) 1 Cyc. 285; (4) 1 Cyc. 301.

NEWMAN ET AL. v. HORNER.

[No. 8,103. Filed January 6, 1914.]

1. **APPEAL.—Questions Reviewable.—Briefs.**—Although appellants' briefs show only a partial compliance with clause 5 of Rule 22, the court will consider the questions in so far as they can be ascertained from the briefs with reasonable certainty, so that the demurrer to a complaint will be considered where a copy of such complaint is appended to the briefs and sufficient reference thereto is made in such briefs. p. 299.
2. **APPEAL.—Briefs.—Waiver of Objections.**—Objections to a complaint, not urged in appellants' briefs on appeal, are waived. p. 299.
3. **CONTRACTS.—Contract for Repurchase of Stock Certificate.—Breach.—Complaint.—Sufficiency of Demand.**—In an action on a contract to repurchase a certificate of stock sold to plaintiff, a complaint showing that plaintiff was at all times ready and willing to transfer such certificate to the defendants on payment by them of the amount due under the contract, and that defendants had been requested to carry out the contract and had refused, showed a sufficient compliance on plaintiff's part, since the refusal of defendants to carry out the contract excused plaintiff from the necessity of a formal tender. p. 301.
4. **CONTRACTS.—Performance of Condition.—Tender.—Sufficiency of Complaint.**—As a general rule a tender to be sufficient must be unconditional, but where there are conditions precedent to be performed by the other party, or where there are mutual and dependent obligations to be performed, the tender may be sufficient though conditioned on performance by the party to whom it is made, of the obligations resting on him, hence a complaint for breach of a contract to repurchase a stock certificate held by plaintiff was not open to the objection that it showed an insufficient tender, and that plaintiff's offer to assign the stock was accompanied by a demand for more than was due, where its averments showed that the transfer of the stock to defendants was dependent on payment therefor by them according to the terms of the contract, and that an offer was made by plaintiff to transfer the stock to defendants conditioned only on the payment of the amount due him. p. 302.
5. **APPEAL.—Questions Reviewable.—Findings and Conclusions of Law.—Briefs.**—Where neither the special findings nor their sub-

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stance is set out in appellants' brief, there is no compliance with clause 5 of Rule 22 so as to present any question thereon, and though the substance of some of the findings is sufficiently set forth, no question is presented where it does not appear from the briefs that exceptions were reserved to the conclusions of law. p. 302.

6. *APPEAL. — Questions Reviewable. — Sufficiency of Evidence. — Briefs.*—No question is presented on the alleged insufficiency of the evidence where there is no attempt to set out the evidence in appellants' brief, or to give a condensed recital thereof in narrative form. p. 303.

From Monroe Circuit Court; *James B. Wilson*, Judge.

Action by Jacob A. Horner against James H. Newman and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

J. J. LaFollette, for appellants.

J. E. Henley, for appellee.

FELT, J.—The appellee brought this suit against William T. Breeden, John H. Doddridge, James H. Newman, W. H. Welch, Arthur G. Allen and Oscar L. Horner, to recover upon a written contract for the repurchase of stock certificate No. 9 issued by the Monarch Stone Company. Error is assigned in overruling appellants' demurrer to appellee's complaint, in the conclusion of law on the facts found and in overruling appellants' motion for a new trial. Appellee

contends that no question is presented by the appeal

1. because of appellants' failure to comply with the rules of the court in the preparation of their briefs.

The briefs show only a partial compliance with the fifth clause of Rule 22, but in so far as the questions may be ascertained from the briefs with reasonable certainty we shall consider them. Appellants have appended to their briefs a copy of the complaint, to which sufficient reference is made in the briefs to enable us to consider the demurrer to the complaint. Only two objections are urged to

2. the complaint. Others, if any, are therefore waived.

The first is, that the offer to assign the stock was

accompanied with a demand for more than was due; the second, that the tender of the stock is insufficient because the averments only show a willingness to transfer, without any affirmative act on the part of the appellee amounting to a tender.

We give the substance of the complaint so far as material to the questions presented. It shows that on September 15, 1905, there was assigned to Arthur G. Allen, certificate of stock No. 9 for ten shares of preferred stock, of the Monarch Stone Company, a corporation organized under the laws of the State of Indiana; that at the same time defendants William T. Breeden, John H. Doddridge, James H. Newman, and W. H. Welch, by a written instrument, for a valuable consideration, jointly and severally promised to buy from said Allen or his assigns said certificate No. 9, at its face value, with all interest or dividends accrued thereon; that on September 23, 1905, for a valuable consideration said Arthur G. Allen duly assigned said certificate of stock and said written agreement of purchase to Oscar L. Horner; that on June 5, 1906, for a valuable consideration, said Oscar L. Horner assigned said certificate and said agreement of purchase to Jacob A. Horner. Copies of said assignments are duly set out with and made a part of the complaint. It is also averred that defendants Breeden, Doddridge, Newman and Welch, jointly and severally failed and refused to perform and carry out said agreement to purchase, though requested so to do; that plaintiff demanded the amount due on said contract of purchase and said defendants have wholly failed and refused to pay him the amount due or any part thereof; that at all times since he became the owner of said certificate, plaintiff has been ready and willing to transfer said certificate of stock to said defendants or their assigns, by a valid assignment thereof, upon the payment to him of the par value of said certificate and the accrued interest or dividends thereon; that the par value thereof is \$1,000; that said Monarch Stone Company is insolvent;

that said defendants are indebted to him in the sum of \$1,500 as aforesaid, which is due and unpaid; that "he now tenders and offers to transfer to said defendants who executed said agreement to purchase said certificate of stock, and that he is ready to make said transfer at any time during the pendency of this action upon full payment being made, as provided in said agreement;" that said Arthur G. Allen and Oscar L. Horner are made parties defendant to set up any interest they may have or claim in said certificate of stock or said agreement to purchase. Prayer for judgment against Breeden, Welch, Doddridge and Newman for \$1,500.

The complaint does not aver an absolute and unconditional tender of the stock duly assigned by the appellee to the appellants. The averments, however, show that the

3. appellee was at all times ready and willing to transfer said certificate to appellants on payment by them to him of the amount due under the contract and that appellants had been requested to carry out the contract of purchase and had refused so to do. The refusal of appellants to carry out the contract would excuse appellee from the necessity of a formal tender. The averments show that he was the owner of the certificate and under such circumstances, if he were, as alleged, at all times ready and willing to transfer the stock on payment to him of the amount due therefor under the contract of purchase, that was a sufficient compliance with the contract on his part to warrant a recovery by him, if he was otherwise entitled thereto. The averments do not show a demand for any specific amount on transfer of the stock, but when fairly construed, show that the offer to transfer the stock was conditioned only on the payment to appellee of the amount due him therefor according to the contract of purchase. This was a condition with which appellee had the right to demand compliance, for it was in accordance with the provisions of the contract.

The general rule is well established that a tender to be sufficient must be unconditional, but there are instances, in

the nature of exceptions to the general rule, where the

4. rule is not strictly applicable. Where there are conditions precedent to be performed by the other party, or where there are mutual and dependent obligations to be performed, the tender may be conditioned on performance by the party to whom it is made, of the obligations resting upon him. A more accurate and comprehensive statement of the general rule, perhaps, would be that the tender to be good must not be accompanied by any condition to which the party to whom it is made has any legal right to object, and is not invalidated by being coupled with a condition which the party making it has the right to impose and to which the other party cannot reasonably object. In this case the transfer of the stock to appellants was dependent on payment therefor by them according to the terms of the contract. *Ames v. Ames* (1910), 46 Ind. App. 597, 603, 91 N. E. 509; *Jordan v. Johnson* (1912), 50 Ind. App. 213, 219, 98 N. E. 143; 28 Am. and Eng. Ency. Law (2d ed.) 31; 38 Cyc. 152; *Odum v. Rutledge, etc., R. Co.* (1891), 94 Ala. 488, 10 South. 222; *Hampton v. Speckenagle* (1822), 9 S. & R. (Pa.) 212, 11 Am. Dec. 704. The complaint is not bad for the reasons assigned and we find no error in overruling the demurrer thereto.

The appellants have not complied with clause 5 of Rule 22 which requires “a concise statement of so much of the record as fully presents every error and exception

5. relied on.” The special findings of the court are not set out nor is the substance thereof stated so as to apprise the court of the contents thereof. The substance of some of the findings is given as a part of the argument, but the same is wholly insufficient to fully present the error relied on. Furthermore, it is not shown by the briefs that appellants excepted to the conclusions of law and in the absence of an exception duly reserved, no question would be presented, even if the facts were sufficiently set forth in the brief. *Tisdale v. State* (1906), 167 Ind. 83, 78 N. E.

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324; *Holliday v. Anheir* (1910), 174 Ind. 729, 93 N. E. 1; *Anderson v. Leonard* (1912), 51 Ind. App. 14, 98 N. E. 891; *Town of Jasper v. Cassidy* (1913), 53 Ind. App. 678, 102 N. E. 278; *Laatsch v. Andree* (1912), 51 Ind. App. 242, 99 N. E. 451; *Miller v. Ruse* (1913), 54 Ind. App. 25, 101 N. E. 343.

The only reference to the grounds of the motion for a new trial is in the argument, where it is said: "The motion for a new trial questions the sufficiency of the evidence to warrant the court in finding the facts as he did" and that "the second cause for a new trial is that the finding of facts is contrary to law." It is claimed there is no evidence to support some of the findings, but appellants have made no attempt to set out the evidence, or to give a condensed recital thereof in narrative form. Therefore no question is presented on the motion for a new trial. *Hartzell v. Hartzell* (1906), 37 Ind. App. 481, 485, 76 N. E. 439; *Chicago, etc., R. Co. v. Newkirk* (1911), 48 Ind. App. 349, 93 N. E. 860.

No reversible error is presented. Judgment affirmed.

Hottel, P. J., not participating.

Lairy, C. J., Ibach, Caldwell and Shea, JJ., concur.

NOTE.—Reported in 103 N. E. 820. As to sufficiency and effect of tender, see 77 Am. Dec. 470; 30 Am. St. 460. See, also, under (1) 2 Cyc. 1013; (2) 3 Cyc. 388; (3) 9 Cyc. 635; 38 Cyc. 134; (4) 38 Cyc. 167; (5) 2 Cyc. 728, 730, 1013; (6) 2 Cyc. 1015.

TALGE MAHOGANY COMPANY v. HOCKETT.

[No. 8,159. Filed January 6, 1914.]

1. TRIAL.—*Instructions.—Inferences from Facts Proved.—Negligence.*—While it is error to tell a jury what inference it shall, must, or ought to draw from certain facts, the court does not invade the province of the jury by stating in an instruction that negligence might be inferred if certain facts were found to be proved, but is thereby exercising the prerogative and duty of the court. p. 305.

2. **NEGLIGENCE.—Presumptions.—Trial.—Instructions.—Proof** that all the instrumentalities causing an injury were under the exclusive control and management of defendant, that the accident was such as ordinarily would not have occurred if due care had been exercised by defendant, and that a duty to exercise such care was owing the plaintiff from defendant, casts upon the defendant the presumption of negligence and the burden of explaining the accident consistent with due care on his part; hence an instruction that if defendant was to erect a scaffold to be used by plaintiff in placing a certain hopper for defendant, and knew the approximate weight of such hopper and was informed of the number of men that would be required on such scaffold, and accordingly caused the scaffold to be constructed, and that such scaffold broke and fell with plaintiff while he was in the act of placing such hopper, the jury could infer negligence in the construction, in the absence of other evidence as to the cause of the accident, was not objectionable as placing on defendant the burden of proving that it was not negligent. p. 306.
3. **APPEAL.—Review.—Admission of Evidence.—Sufficiency of Motion to Strike.**—In an action for personal injuries from the fall of a scaffold furnished by defendant for plaintiff in the performance of certain work for defendant, where plaintiff, on direct examination, testified that after the accident he had examined the piece of timber which broke in the scaffold, and again on re-direct examination was examined concerning it, and then on re-cross-examination it was developed that he had no personal knowledge that the timber examined had been a part of the scaffold, a motion "to strike out the evidence on that piece of timber because he is testifying as to hearsay", was not sufficiently specific and the overruling of the same was not error. p. 308.
4. **NEGLIGENCE.—Answers to Interrogatories.—Verdict.—Contributory Negligence.**—In an action for personal injuries from the fall of a scaffold erected by defendant for the use of plaintiff in placing a certain hopper for defendant, answers by the jury to interrogatories showing that he saw the scaffold erected, that after he went on it he heard it crack with a sound as though breaking, that he then made an examination to see if it was strong enough to bear the strain of raising the hopper, said he believed it was all right, and then went ahead with the work, and also showing that he was not familiar with the construction of scaffolds and was incompetent to discover that the scaffold was weak or defective by examination thereof either before or after going on same, do not show that plaintiff was guilty of contributory negligence, and are not in conflict with the general verdict for plaintiff. p. 308.

From Hamilton Circuit Court; *Meade Vestal*, Judge.

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Action by George M. Hockett against the Talge Mahogany Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

William D. Headrick and *Samuel K. Ruick*, for appellant.
George W. Galvin, for appellee.

IBACH, J.—The court gave the following instruction: “If the plaintiff agreed with the defendant to make and put in place in defendant’s boiler room a galvanized iron hopper, the size and approximate weight of which was known to defendant, and as part of the contract the defendant agreed to construct a scaffold to be used by plaintiff and other workmen in erecting said hopper, and if defendant was informed as to the number of men that would be required to go upon said scaffold, and accordingly caused its workmen to construct the scaffold, and when completed the plaintiff and his helpers went upon said scaffold and while in the act of putting said hopper in place the scaffold broke and fell and plaintiff was thrown to the ground and sustained the injuries complained of, in the absence of other evidence of the cause of the fall of said scaffold, the jury may infer from the very fact that it broke and fell that the defendant was negligent in doing the work of its construction or in selecting the material therefor, if it appears that at the time the scaffold broke it was being used in the manner as contemplated by defendant.”

The authorities do not support the contention that the court, in giving this instruction, invaded the province of the jury by stating that it might infer negligence from

1. certain facts, if it found them to exist. The authorities cited by appellant hold only that it is error for the court to tell the jury what inference it *shall*, *must*, or *ought* to draw from certain facts. Where the judge tells the jury what inference *shall*, *must*, or *ought* to be made from indicated facts, he is clearly invading the jury’s prov-

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ince, but where he tells the jury what inference *may* be drawn from a given state of facts, he is not only not invading the province of the jury, but is exercising the prerogative and duty of the court. It was said by Mitchell, J., in the case of *Wabash, etc., R. Co. v. Locke* (1887), 112 Ind. 404, 421, 14 N. E. 391, 2 Am. St. 193, "While it is quite true that it is the duty of the jury, under proper instructions, to determine whether or not upon any given state of facts negligence *ought* to be inferred, it is nevertheless the duty of the court first to say whether, upon the facts most favorable to the plaintiff, negligence *can* be inferred. * * * 'The judge * * * has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct.' "

It is also urged that, in the absence of other evidence of the cause of the fall of the scaffold, it was wrong for the jury to infer negligence of the defendant in constructing

2. the scaffold or in selecting material for it, from the mere fact that the scaffold broke and fell while being used in the manner contemplated by defendant; and that this instruction shifted the burden of proving negligence from the plaintiff, and placed the burden of proving that it was not negligent on the defendant. After a review of many cases the court said, in *Knoefel v. Atkins* (1907), 40 Ind. App. 428, 436, 81 N. E. 600, "From a consideration of all the cases on the subject this general rule may be adduced: Where an accident happens resulting in the injury to a person or his property, and it is made to appear that all the instrumentalities causing the accident are under the exclusive control and management of the defendant, and

the accident is such as ordinarily would not occur if due care was exercised by those who have control of such instrumentalities, and a duty to exercise such care is owing the plaintiff from the defendant, then proof of the circumstances of the accident and injury resulting therefrom casts upon the defendant the presumption of negligence and the burden of explaining the accident consistent with due care on his part.” “In some cases a presumption of negligence arises from the very nature of the cause of the damage sustained. The meaning of the well-known maxim, ‘*res ipsa loquitur*’ is simply that the nature of the event is such that the immediate efficient cause of the injury itself declares its negligent character, giving rise to the presumption of negligence. * * * In the case of the falling of an article upon a person, or the rolling or hurling of one against him, or the toppling over of a structure, or of an article resting against a structure, the principle of *res ipsa loquitur* operates.” 8 Ency. Evidence 871, 886. “The fall of a building, a scaffold, an elevator or other hoisting machinery, the sudden giving way of the door of a railway carriage, the fall of a gangway plank between a ship and wharf, or the explosion of a boiler is presumptive evidence of negligence.” 1 Shearman & Redfield, Negligence (6th ed.) §60. This was not a case of master and servant, but one where plaintiff was on defendant’s premises by invitation, and where defendant had contracted to furnish a scaffold for the work which plaintiff was to do, which contract necessarily carried the obligation to furnish an ordinarily safe scaffold. But the courts have not hesitated to apply the doctrine of *res ipsa loquitur* to cases where a servant fell from a scaffold provided by the master. *Solarz v. Manhattan R. Co.* (1898), 155 N. Y. 645, 8 Misc. 656, 29 N. Y. Supp. 1123, 49 N. E. 1104; *Green v. Banta* (1882), 97 N. Y. 627, 48 N. Y. Super. Ct. 156; *Flynn v. Gallagher* (1885), 52 N. Y. Super. Ct. 524; *Westland v. Gold Coin Mines Co.* (1900), 101 Fed. 59, 41 C. C. A. 193; *Cleary v. General Contracting Co.* (1909), 53 Wash. 254,

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101 Pac. 888; *Prendible v. Connecticut R. Mfg. Co.* (1893), 160 Mass. 131, 35 N. E. 675; *Arkerson v. Dennison* (1875), 117 Mass. 407.

The following cases from our own State also generally support the doctrine announced in the instruction under consideration. *Louisville, etc., Traction Co. v. Worrell* (1906), 44 Ind. App. 480, 86 N. E. 78; *Bedford, etc., R. Co. v. Rainbolt* (1885), 99 Ind. 551; *Indianapolis St. R. Co. v. Darnell* (1904), 32 Ind. App. 687, 68 N. E. 609; *Chicago, etc., R. Co. v. Vester* (1911), 47 Ind. App. 141, 93 N. E. 1039; *Chicago, etc., R. Co. v. Pritchard* (1907), 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857; *Indiana Union Traction Co. v. Scribner* (1911), 47 Ind. App. 621, 93 N. E. 1014. The court did not err in the giving of this instruction.

Appellee on direct examination testified that after the accident, he had examined the piece of timber which broke in the scaffold, and answered several questions relating to it. Again on redirect examination he was questioned concerning this piece of timber, and then upon recross-examination it was developed that he did not have personal knowledge that the piece of timber about which he had testified had been a part of the scaffold. Appellant's counsel then moved the court "to strike out the evidence on that piece of timber because he is testifying as to hearsay." The court did not err in overruling this motion, for it was not sufficiently specific, and did not indicate with reasonable certainty the particular answers sought to be stricken out. *O'Brien v. Knotts* (1905), 165 Ind. 308, 316, 75 N. E. 594; *Wysor Land Co. v. Jones* (1900), 24 Ind. App. 451, 459, 56 N. E. 46.

It is found by answers to interrogatories that appellee saw the scaffold erected, that after he went on the scaffold he heard it crack, with a sound something like it

4. was breaking, that he then made an examination of the scaffold to see if it was strong enough to bear

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the strain of raising the hopper, said that he believed it to be all right, and then went ahead with the work. It is also found that appellee by examination either before he went on to the scaffold or after the scaffold cracked could not have learned that it was weak, defective, or not of sufficient strength to bear the weight of placing the hopper in position, for the reason that he was not competent, and also that he was not familiar with the construction of scaffolds. These answers do not show appellee to have been guilty of contributory negligence, and are not in conflict with the general verdict by which he was found not to have contributed by his negligence to his injury, for, under the issues, evidence was admissible from which the jury may have found that appellee after he heard the scaffold crack made such an examination and such tests of its strength as a man of ordinary prudence not skilled in the construction of scaffolds would make, but could not learn that it was weak, and that after such examination a reasonably prudent man would continue in the use of such scaffold.

No error has been made to appear, and the judgment is affirmed.

NOTE.—Reported in 103 N. E. 815. As to presumption of negligence from happening of accident, see 113 Am. St. 986. As to presumption of exercise of care, see 116 Am. St. 108. For presumption of negligence from occurrence of accident to person on defendant's premises, see 15 L. R. A. 33. See, also, under (1) 38 Cyc. 1673; (2) 29 Cyc. 590, 597, 643; (3) 38 Cyc. 1404; (4) 29 Cyc. 658.

INDIANAPOLIS TRACTION AND TERMINAL COMPANY v. TAYLOR.

[No. 8,067. Filed January 7, 1914.]

1. STREET RAILROADS.—*Injuries to Persons on Tracks.—Negligence.—Contributory Negligence.—Jury Question.*—In an action for injuries caused by a street car colliding with plaintiff's wagon, where there was evidence showing that plaintiff drove upon the track at a place where the street was not lighted, to pass a coal wagon, and continued driving on the track for a distance of about

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seventy-five feet, and that before he was able to pass the wagon and turn off the track defendant's car approached from the rear at the rate of thirty-five to forty miles an hour, without sounding a gong or giving other warning of its approach, and struck plaintiff's wagon, and that before going on the track plaintiff looked, but saw no car, although the car was lighted and he had an unobstructed view for a distance of three or four squares, and other evidence showing that plaintiff turned upon the track about fifteen feet ahead of the car, that the motorman first saw him then and that it was impossible to prevent the collision, that the car was running at about eight miles an hour, and that the gong was repeatedly sounded, the questions of defendant's negligence, and contributory negligence by plaintiff, were properly submitted to the jury. p. 311.

2. WITNESSES.—*Experts.—Credibility.—Weight of Testimony.*—An expert witness is upon the same footing as any other witness in so far as his credibility is concerned, and the weight of his testimony should be determined by the same rules, so far as applicable, which apply to the testimony of other witnesses. p. 313.
3. TRIAL.—*Instructions.—Testimony of Experts.*—Instructions should be free from any tendency to discredit expert witnesses and to disparage their testimony, hence an instruction that in effect told the jury that it had a right to reject the testimony of the expert witnesses, or of any of them, if from the evidence it thought it ought to do so, was erroneous, since it may have been accepted by the jury as a warrant to reject such testimony regardless of its truth. pp. 313, 314.
4. EVIDENCE.—*Weight of Evidence.—Rejection.*—A jury has no right to arbitrarily reject or refuse to consider the testimony of any witness; but if there is anything in the character, appearance or conduct of the witness, or in his testimony when considered in the light of other testimony, and the circumstances of the case, that would make his testimony seem unworthy of belief, or if he has been successfully impeached or contradicted, the jury may reject it to the extent that they regard it as false. p. 314.
5. TRIAL.—*Instructions.—Province of Jury.—Testimony of Experts.*—An instruction that the opinions of experts are not admitted for the purposes of controlling the judgment of the jury, but to be considered for what they are worth in the opinion of the jury when considered in connection with the other evidence, invaded the province of the jury. p. 315.
6. EVIDENCE.—*Consideration by Jury.*—It is the exclusive province of jurors to decide what weight and probative force they will give to each item of evidence, and while a jury is not bound to give controlling effect to any particular evidence, it may do so, if it believes it should have such effect. p. 315.

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From Johnson Circuit Court; *William E. Deupree*, Judge.

Action by John F. Taylor against the Indianapolis Traction and Terminal Company. From a judgment for plaintiff, the defendant appeals. *Reversed*.

F. Winter, W. H. Latta, L. Ert Slack and M. E. Foley, for appellant.

Charles B. Clarke, Walter C. Clarke and Miller & White, for appellee.

E. A. McAlpin and Miller, Shirley, Miller & Thompson, Amici Curiae.

LAIRY, C. J.—Appellee, as plaintiff below, recovered a judgment against appellant for damages resulting from personal injuries received by him, caused by one of appellant's cars colliding with a wagon in which he was riding. The only error relied on for reversal is the action of the trial court in overruling appellant's motion for a new trial. The negligence charged against appellant is that it carelessly and negligently operated its car at a high and dangerous rate of speed and that it failed to sound the gong or to give any other warning of its approach and that while appellee was driving east on West Michigan Street and while he was in the act of driving around a coal wagon which was proceeding in the same direction, appellant's car approached from the rear and was negligently run against the wagon on which plaintiff was riding.

The evidence shows that there is a double street car track on West Michigan Street where the collision occurred

and that appellant's car was running east on the

1. south track. The collision occurred after dark at a

place where the street was not lighted. The street car was lighted and there was an unobstructed view to the west for three or four squares. The evidence on behalf of appellee shows that he was on the south side of the street driving east and that a coal wagon was just ahead of him on the same side of the street; that he turned to the north

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upon the tracks of the street car company and drove east thereon a distance of about seventy-five feet for the purpose of passing the coal wagon and that before he was able to pass the wagon and turn off the track, appellant's car approached from behind and struck the wagon causing his injury; that the car at the time was running at a speed of thirty-five to forty miles an hour, and that no gong was sounded or other warning given of its approach. Appellee testified that he looked back twice after he turned upon the track and that he did not drive over forty feet without looking behind him, and that he did not see or hear the car until the wagon was struck. The evidence on behalf of appellant shows that appellee, immediately before the collision, was on the north side of the street and that he turned across the street toward the south at a point about fifteen feet in front of the moving car; that the motorman first saw the wagon as it turned upon the track and that it was impossible to stop the car in time to prevent a collision; that the car was running at the rate of about eight miles an hour and that the gong was repeatedly sounded as the car approached the place where the collision occurred. Under this evidence the court properly submitted the question of appellant's negligence to the jury and also the question as to whether appellee was guilty of contributory negligence. *Indianapolis Traction, etc., Co. v. Kidd* (1906), 167 Ind. 402, 79 N. E. 347, 7 L. R. A. (N. S.) 143, 10 Ann. Cas. 942; *Indianapolis St. R. Co. v. Marschke* (1906), 166 Ind. 490, 77 N. E. 945; *Pittsburgh, etc., R. Co. v. Lynch* (1909), 43 Ind. App. 177, 87 N. E. 40.

As bearing upon both of the questions of fact thus submitted, the speed of the car immediately prior to the collision was a very important matter. One witness who had no experience in the operation of cars and who possessed no expert knowledge on that subject, testified that the car was running at the rate of thirty-five or forty miles an

hour. On behalf of appellant, two or three witnesses testified that the car was not running faster than eight or ten miles an hour. These witnesses had all had experience in the operation of cars and professed to have some expert knowledge on the subject of their speed. Besides this, one witness testified as an expert to the effect that he had made tests of cars of a similar type to the one connected with this accident and that a car of that type is not capable of attaining a speed in excess of twenty-one miles an hour. Under this state of the evidence, the court gave to the jury a number of instructions in regard to the rules to be observed in weighing the evidence and determining the credibility of the witnesses. Among the instructions so given was one particularly referring to expert witnesses which is as follows: "No. 11. The opinions of expert witnesses are admissible in evidence for the consideration of the jury. The opinions of such witnesses are not admitted for the purpose of controlling the judgment of the jury, but to be considered for what they are worth in your opinion when considered with the other evidence in the case. If you think from all the evidence in the case that you ought to reject the testimony of the expert witnesses or any of them, you have the right to do so." It has been held that an

expert witness stands upon the same footing as any

2. other witness in so far as his credibility is concerned and that the weight of his testimony should be determined by the same rules, so far as applicable, which apply to the testimony of other witnesses. *Eggers v. Eggers* (1877), 57 Ind. 461; *Humphries v. Johnson* (1863), 20 Ind. 190; *Cuneo v. Bessoni* (1878), 63 Ind. 524. Instructions

which have a tendency to discredit expert witnesses

3. and to disparage their testimony have been frequently held to be erroneous. *Atchison, etc., R. Co. v. Thul* (1884), 32 Kan. 255, 4 Pac. 352, 49 Am. Rep. 484; *Langford v. Jones* (1890), 18 Or. 307, 22 Pac. 1064; *Rivard v. Rivard*

(1896), 109 Mich. 98, 66 N. W. 681, 63 Am. St. 566. By the instruction under consideration, the jury was told that it had a right to reject the testimony of the expert witnesses or any of them, if from the evidence it thought it ought to do so. It is the duty of the jury to con-

4. sider all of the evidence permitted to go to it by the court and it has no right, arbitrarily, to reject or to refuse to consider the testimony of any witness. If there is anything in the appearance or conduct of a witness or the character of his testimony which leads the jury to believe that he is testifying falsely; or, if his testimony, when considered in the light of the other evidence and the circumstances of the case, seems to the jury to be incredible and unworthy of belief; or if he is successfully impeached or contradicted by other credible witnesses, the jurors may reject his evidence in whole or in part because they believe it to be untrue or believe the witness to be unworthy of credit. Under such circumstances the jurors may receive the testimony or may reject it depending on whether they regard it as true or false. If found true, it should be considered; if found false, it should be discarded.

A court should not by its instructions give jurors

3. to understand that they have a right to reject the testimony of a witness simply because they think they ought to do so. The jurors might take such an instruction as a warrant to reject testimony regardless of its truth, if such testimony stood in the way of a verdict which their sympathies prompted them to return. We do not think that the jury would understand this instruction to mean that it had the right to reject the testimony of a witness in case such testimony was considered unworthy of belief and for no other reason, but, even if it could be given such a meaning, that rule does not apply to the testimony of expert witnesses with any greater force than to the testimony of any other witness, and there was no reason for limiting the instruction to the expert witnesses.

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By this instruction, the jury was further told that the opinions of expert witnesses were not admitted for the purposes of controlling the judgment of the jury but to

5. be considered for what they were worth in the opinion of the jury when considered in connection with the other evidence in the case. By this part of the instruction, we think that the court invaded the province of the jury. It is the province of the court to determine what matters shall go to the jury as evidence, and it may also direct the jury to consider certain evidence only in connection with certain issues to which it is applicable; but it is for the jury alone to determine what weight and probative force it will give to the evidence. All evidence is admitted for the purpose of affecting the minds of the jurors in some way. It is possible that the testimony of a witness or of a class of witnesses might be so clear and convincing as to exert a controlling influence on the minds of the

6. jurors. It is the exclusive province of jurors to decide what weight and probative force they will give to each item of evidence; and in so doing they determine the extent to which such evidence shall influence or control their action. The jury is not bound to give a controlling effect to any particular evidence, but it may do so, if in the opinion of the jury it should be given that amount of weight. The Supreme Court has held that it was error for the court to instruct the jury that in a doubtful case the opinions of experts ought to control. *Humphries v. Johnson, supra*. The converse of the proposition must necessarily be true. It is not for the court to say that the opinion of such witnesses shall or shall not control. It is the province of the jury to determine what force and effect shall be given to such opinions.

Other questions are presented by the record, but as the same questions may not arise at another trial, they are not considered in this opinion.

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For error in giving the instruction No. 11, the judgment is reversed with directions to grant a new trial.

NOTE.—Reported in 103 N. E. 812. On the general question of injuries by street car collisions with vehicles or horses, see 25 L. R. A. 508. As to the duty and liability of a street railway, as to vehicles moving along its tracks, see 7 Ann. Cas. 1127; 18 Ann. Cas. 510. See, also, under (1) 36 Cyc. 1616, 1624, 1625; (2) 17 Cyc. 262; (3, 5) 38 Cyc. 1737; (4) 38 Cyc. 1518, 1522; (6) 38 Cyc. 1516.

DAVIS ET AL. v. BROYLES ET AL.

[No. 8,224. Filed January 7, 1914.]

1. APPEAL.—*Questions Reviewable.—Briefs.*—The statement in appellants' brief, under the heading "Errors", that "the court erred in overruling appellants' motion to modify the judgment and decree entered in the cause. * * * The court erred in overruling appellants' motion for a new trial", was insufficient to present any question on appeal, where neither of such motions was set out, and it nowhere appeared from such brief that such rulings were among those assigned as error, or that they were relied on for reversal, or that appellants had in fact assigned any error. p. 317.
2. APPEAL.—*Insufficiency of Briefs.—Dismissal.*—Where none of the questions attempted to be presented by appellants' brief on appeal can be intelligently determined without resort to the record, a dismissal of the appeal is required. p. 317.

From Superior Court of Marion County (82,964) ; *Charles J. Orbison*, Judge.

HOTTEL, P. J.—Appellants, as trustees of the Second Second Baptist Church in Indianapolis, against Frances E. Broyles and others. From a judgment for plaintiffs. the plaintiffs appeal. *Appeal dismissed.*

James A. Bryant, for appellants.

HOTTEL, P. J.—Appellants, as trustees of the Second Baptist Church in Indianapolis brought this action against appellees to reform a deed and to quiet title to certain real estate described in their complaint. The trial court ren-

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dered a judgment decreeing appellants to be the owners of the real estate and reformed their deed and quieted their title thereto; but further adjudged and decreed that appellees have a lien thereon for \$——— and ordered that such real estate be sold to satisfy the lien.

From this judgment appellants appeal and file their brief in this court in which, under the heading "Errors", they say: "The court erred in overruling appellants'

1. motion to modify the judgment and decree entered in the cause. * * * The court erred in overruling appellants' motion for new trial." It is nowhere stated in the brief that such rulings were among those assigned as error or that they are relied on for reversal. In fact nothing appears from the brief to show that appellants have ever assigned error in this court, but assuming without deciding that the statement under the heading "Errors" above indicated is sufficient to show the errors relied on for reversal, the brief nowhere sets out either of said motions.

None of the pleadings are set out in the brief. Other failures to comply with the rules might be pointed out but

enough has been indicated to show that none of the

2. questions attempted to be presented could be intelligently determined without resort to the record. It follows that the appeal must be dismissed. *Wilt v. Board, etc.* (1913), 54 Ind. App. 240, 102 N. E. 878, and authorities there cited; *Scott v. State* (1911), 176 Ind. 382, 384, 96 N. E. 125; *Taylor v. Schradsky* (1912), 178 Ind. 217, 97 N. E. 790.

Appeal dismissed.

NOTE.—Reported in 103 N. E. 815. See, also, under (1) 2 Cyc. 1014, 1017; (2) 2 Cyc. 1013.

STATE OF INDIANA, EX REL. GREENWALD, PROSECUTING ATTORNEY, v. SCHLICKER.

[No. 8,081. Filed January 8, 1914.]

1. MUNICIPAL CORPORATIONS.—*Officers.—Removal.—Statutory Provisions.*—The Cities and Towns Act (Acts 1905 p. 278, §8883 *et seq.* Burns 1908) covers the whole subject of municipal legislation, and is a complete revision of the law for the government of cities and towns, and in view of §272 of the act (§9016 Burns 1908) repealing all former laws within the purview of the act, §240 thereof (§8894 Burns 1908) providing for the removal of the mayor and other officer of any city or town on conviction for oppression, malconduct or misfeasance in office, supersedes §9662 Burns 1908, Acts 1897 p. 278, §35, relating to the removal of officers generally. pp. 319, 321, 323.
2. WORDS AND PHRASES.—*"Purview."*—The word "purview" as used in the law, means the enacting part of a statute as distinguished from the preamble, so that the provision of an act repealing all acts coming within its purview must be understood as repealing all acts in relation to all cases provided for by the repealing act, and not merely such as are inconsistent with its provisions. p. 321.
3. STATUTES.—*Construction.—Repeal.*—In construing a statute to determine the scope of its repealing clause, it is the duty of the court to take into account the history of the act and the legislative intent. p. 321.
4. STATUTES.—*Codification.—Authority of Commissioners.*—Under the act of 1903 (Acts 1903 p. 391), creating a commission to codify the statutes concerning public, private, and other corporations, the commission had authority to codify all laws concerning public corporations such as towns, and such authority was broad enough to authorize the fixing of penalties to be inflicted upon the delinquent officials of such corporations. p. 323.

From Lake Superior Court; *Virgil S. Reiter*, Judge.

Action by the State of Indiana, on the relation of Charles E. Greenwald, Prosecuting Attorney in and for the Thirty-first Judicial Circuit, against Alexander G. Schlicker. From a judgment for defendant, the relator appeals. *Affirmed.*

J. A. Gavit, Kennedy & Shunk, John H. Gillett and Charles E. Greenwald, for appellant.

W. J. McAleer and L. V. Cravens, for appellee.

State, ex rel. v. Schlicker—55 Ind. App. 318.

SHEA, J.—This is an appeal from a proceeding brought by appellant to oust appellee from the office of mayor of East Chicago, Indiana. The amended accusation before the court, and upon which ruling was made, charges that while appellee, Alexander G. Schlicker was the duly elected mayor of the city of East Chicago, in Lake County, Indiana, and while so acting as mayor, he committed very many acts of misconduct in public office, permitted all sorts of lawlessness, gambling and other crimes to be committed after having been duly notified of their existence; that he caused material to be purchased from corporations in which he was interested; that he permitted employes of the city to furnish supplies to the city; that he drew from the city treasury sums largely in excess of the amounts he was entitled to as salary as mayor; that he sold personal property belonging to the city, and received pay therefor; that such acts constituted a refusal and neglect on his part to perform his official duties. Prayer that appellee be deprived of and ousted from his office. Judgment for \$500 and all other proper relief is asked in favor of the relator, the prosecuting officer Charles E. Greenwald.

Appellee's motion to dismiss the cause was sustained by the court, and judgment rendered in his favor. It is assigned that the court erred in sustaining this motion, and in rendering judgment dismissing the cause.

On behalf of appellant, it is insisted that the action was brought under §9662 Burns 1908, Acts 1897 p. 278, §35, which is an act providing for the impeachment and

1. removal from office of public officers, approved March 8, 1897, which reads as follows: "When an accusation in writing, verified by the oath of any person, is presented to a circuit court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered, or to be rendered, in his office, or has refused or neglected to perform the official duties pertaining to his office, the court

must cite the party charged to appear before the court at any time not more than ten nor less than five days from the time the accusation was presented; and on that day, or some other subsequent day not more than twenty days from the time the accusation was presented, must proceed to hear, in a summary manner, the accusation and evidence offered in support of the same, and the answer and evidence offered by the party accused; and if, on such hearing, it appears that the charge is sustained, the court must enter a decree that the party accused be deprived of his office, and must enter a judgment for five hundred (\$500) dollars in favor of the prosecuting officer, and such costs as are allowed in civil cases.”

It is urged on behalf of appellee that §35 of the act of 1897 was repealed by the act of the General Assembly approved March 6, 1905, being an act concerning municipal corporations (Acts 1905 p. 219). Section 8894 Burns 1908, Acts 1905 p. 219, §240, reads as follows: “In case the mayor or other officer of any city or town shall wilfully or corruptly be guilty of oppression, malconduct or misfeasance in the discharge of the duties of his office, he shall be liable to be prosecuted by indictment or affidavit in any court of competent jurisdiction, and, on conviction, shall be fined not exceeding one thousand dollars, and the court in which such conviction shall be had shall enter an order removing him from office.”

It will be observed that the original act under which this action is brought, provided for the impeachment and removal from office of all public officials within the jurisdiction of the circuit court. Section 240, *supra*, of the Cities and Towns Act provided a penalty for all city officials who should be found guilty of the offenses therein named, and upon conviction, they should be removed from office. Section 9016 Burns 1908, Acts 1905 p. 219, §272, being §272 of the act known as the Cities and Towns Act, reads as follows: “All former laws within the purview of this act

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except laws not inconsistent herewith and enacted at the present session of the general assembly, are hereby repealed," etc.

The word "purview" is defined in the Century Dictionary as follows: "A condition, provision or disposition. In law

that part of a statute which begins with the words

2. 'Be it enacted' as distinguished from the preamble, and hence the whole body of provisions." "Field, scope, sphere or limits of anything, as of a law, authority, etc." It is also defined in the case of *State v. Reynolds* (1886), 108 Ind. 353, 9 N. E. 287, where the court quoting from the case of *Payne v. Conner* (1813), 3 Bibb (Ky.) 180, uses this language: "The meaning usually attached to this term (purview) by writers on law, seems to be the enacting part of a statute, in contradistinction to the preamble; and we think the provision of the act repealing all acts or parts of acts coming within its purview, should be understood as repealing all acts in relation to all cases which are provided for by the repealing act." "Where a statute repeals a prior statute so far as the prior statute comes within the purview of the later one, the word 'purview' applies to the enacting part, the body or subject of the act, in contradistinction from the other parts thereof, such as the preamble, the saving, and the proviso; and hence the repeal is not confined merely to such parts of the former act as are inconsistent with the provisions of the repealing act. *The San Pedro* [1817], 15 U. S. (2 Wheat.) 132, 139, 4 L. Ed. 202." 7 Words and Phrases 5870.

It is the duty of the court to take into account the history and intention of legislative enactments. *Morris v.*

City of Indianapolis (1912), 177 Ind. 369, 94 N. E.

3. 705; *Thomas v. Town of Butler* (1894), 139 Ind. 245, 38 N. E. 803; *Hadley v. Musselman* (1886), 104

1. Ind. 459, 3 N. E. 122. In the well considered case of *Frank v. City of Decatur* (1910), 174 Ind. 388,

92 N. E. 173, the court, having under consideration chapter 129, Acts 1905 p. 219, in referring to the duty of the codification committee which drafted that act, as provided in Acts 1903 p. 391, used the following language, which is appropriate in the consideration of this case: "Out of this direction grew the act of 1905, *supra*, which we know historically was an attempt to systematize, harmonize and simplify our municipal laws. While it could hardly be expected to embrace every possible condition which might arise, it goes far to codify the whole subject. As to all cities, except those of the fifth class, the act is quite definite and specific; as to those of the fifth class, the act depends for construction and enforcement upon the analogous conditions under the other classes." It is within the knowledge of this court that it was the intention of the legislature, in the Cities and Towns Act, *supra*, to legislate upon the whole subject pertaining to cities and towns. In it, by §8894 Burns 1908, *supra*, the legislature provided in a statute broad and comprehensive in its terms for a punishment by fine and for the removal of a city or town official from office in case of failure to discharge his duty. In the case of *Findling v. Foster* (1908), 170 Ind. 325, 84 N. E. 529, the court in construing the language of the highway act of 1905 prepared by the commission created by an act of the General Assembly of 1903, uses this language: "The act of 1905 is the result of the action of the legislature of 1905 on a bill reported to that body by the commissioners appointed under the act of 1903 (Acts 1903 p. 391), 'to prepare a compilation, revision and codification of the laws of the State of Indiana, concerning public, private and other corporations, including * * * statutes relating to highways.' While repeals of statutes by implication are not favored, it is well settled that when a new statute was intended to furnish the exclusive rule on a certain subject, it repeals by implication the old law on the same subject, or when a new statute covers the whole subject-matter of

an old one, and adds new provisions and makes changes, and where such new law, whether it be in the form of an amendment or otherwise, is evidently intended to be a revision of the old, it repeals the old law by implication." It will be observed that the act being construed by the court at this time is even stronger than the highway act construed by the court in *Findling v. Foster, supra*, for the reason that the Cities and Towns Act contains a general repealing clause.

The title to the act of 1903, *supra*, creating the commission which codified and presented to the legislature the

act being considered, contains this language: "An

4. Act creating a commission to prepare a compilation, revision and codification of the Statute laws of the State of Indiana, concerning public, private and other corporations." The first section of the act creating the commission contains this language: "Section 1. Be it enacted by the General Assembly of the State of Indiana, That a commission to prepare a compilation, revision and codification of the laws of the State of Indiana, concerning public, private and other corporations, including statutes concerning combinations and trusts, and also statutes relating to highways and drainage, and such other statute laws of the State of Indiana as such commission shall deem proper", etc. It is clear, therefore, that the commission had authority to codify all laws concerning public corporations such as towns, hence its authority was broad enough to cover penalties to be inflicted upon its delinquent officials.

We think it is also clear that the legislature intended in the Cities and Towns Act to cover the whole subject of municipal legislation, and that it was intended to be

1. a complete revision of the law respecting the government of cities and towns. It is equally clear that there is a conflict in the general act providing for the impeachment of officers, and the Cities and Towns Act, which provided for the impeachment of municipal officers only. The punish-

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ment to be inflicted upon municipal officers for failure or neglect of duty was within the purview of the act. This is determined beyond question by the fact that the legislature actually took cognizance of it, and fixed the punishment which should be inflicted.

Very able briefs have been filed by the learned counsel, and many questions are ably argued, but a further discussion of them in this opinion would needlessly prolong it, and in view of the conclusion we have reached, is unnecessary.

Judgment affirmed.

NOTE.—Reported in 103 N. E. 807. As to removal of officers for cause, see 135 Am. St. 250. As to repeal of statutes by implication, see 14 Am. Dec. 209; 88 Am. St. 271. See, also, under (1) 28 Cyc. 433; (2) 32 Cyc. 1273, 36 Cyc. 1071; (3) 36 Cyc. 1069, 1138, 1169.

HALL v. GRAND LODGE, INDEPENDENT ORDER OF ODD FELLOWS OF INDIANA ET AL.

[No. 8,775. Filed January 8, 1914.]

1. **APPEAL.—Briefs.—Questions Reviewed.**—Although much of appellant's brief is not in conformity to clause 5 of Rule 22, where appellees' brief, though in the main devoted to pointing out the defects of appellant's brief, supplies some facts and discusses the merits of some of the questions, the court will decide such questions as are definitely ascertainable from a consideration of both briefs. p. 326.
2. **WILLS.—Estates Created.—Life Estate with Power of Disposition.**—A devise of an estate in lands to a person generally or indefinitely with a power of disposition carries the fee, but where by clear and definite language the testator expressly gives to the first taker an estate for life only, coupled with a power of disposition, the express limitation of the grant to an estate for life controls, and such devisee does not acquire the fee, but takes for life only, with such power of disposition as the will authorizes. p. 327.
3. **WILLS.—Construction.—Intention of Testator.—Ascertainment of Devisee.**—The pole star in the construction of a will is the intention of the testator, and to ascertain and give effect to such intention, courts may hear evidence of extrinsic facts for the pur-

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pose of removing latent ambiguities and to enable them to identify either the subject-matter or object of the testator's bounty, and a bequest will not be avoided if the intent can thus be established with reasonable certainty; hence a devise to "The Odd Fellows' Orphan Home at Greensburg, Decatur County, Indiana", was not void on the ground that there was no organization by that name, where the evidence and the findings show that the testator intended the Odd Fellows Home at Greensburg. p. 327.

4. **TRIAL.—Verdict.—Scope.**—A general verdict includes a finding of every issuable fact essential to its support. p. 329.
5. **APPEAL.—Review.—Harmless Error.—Instructions.**—An instruction objected to on the ground that it authorized the consideration of circumstances not shown by the evidence, was harmless when considered with other instructions clearly and definitely limiting the jury to the consideration of the facts and circumstances shown by the evidence. p. 330.
6. **APPEAL. — Questions Reviewable. — Objections to Evidence.**—A mere suggestion of error or even a general objection to the admission of evidence is not sufficient to present any question on appeal as to its admissibility. p. 330.
7. **APPEAL.—Objections to Evidence.—Waiver.—Briefs.**—Questions relating to the admissibility of evidence are waived by the failure of appellant's brief to contain a statement of any propositions or points relating thereto, and also by a failure to contain a condensed recital of the evidence in narrative form as required by Rule 22. p. 330.
8. **APPEAL. — Review. — Disposition of Cause.**—Where it appears that substantial justice has been done in the trial court, the court on appeal will not disturb the judgment on alleged intervening errors not affecting the substantial rights of the parties. p. 331.

From Tipton Circuit Court; *Leroy B. Nash*, Judge.

Action by Nancy R. Hall against the Grand Lodge, Independent Order of Odd Fellows of Indiana and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Oglebay & Oglebay, for appellant.

Shirts & Fertig and *Gifford & Gifford*, for appellees.

FELT, J.—Appellant brought this suit against appellees, Grand Lodge, Independent Order of Odd Fellows of Indiana and Rebekah Assembly, Independent Order of Odd Fellows of Indiana, to quiet title to certain real estate in Tipton

County, Indiana. The issues were formed by a general denial to the first paragraph of the amended complaint, which is in the usual short form and alleges that the plaintiff is the owner in fee simple of the real estate therein described. The case had been previously tried and a new trial granted as of right. A trial by jury resulted in a verdict and judgment for appellees, and against appellant for costs. A motion for new trial was made and overruled. The only error assigned is the overruling of appellant's motion for a new trial.

Both parties contend that the briefs are not prepared in conformity with the rules of this court and the objection

must be sustained to much of appellant's brief, for

1. failure to comply with clause 5 of Rule 22. In the main, appellees' brief is devoted to pointing out appellant's failure to comply with the rules of the court, but some facts are supplied and the merits of some of the questions are discussed. We shall, therefore, consider and decide the questions that may be definitely ascertained by a consideration of both briefs. *Harbison v. Boyd* (1912), 177 Ind. 267, 270, 96 N. E. 587; *Schrader v. Meyer* (1911), 48 Ind. App. 36, 95 N. E. 335; *Geisendorff v. Cobbs* (1911), 47 Ind. App. 573, 577, 94 N. E. 236; *Roberts v. Fort Wayne Gas Co.* (1907), 40 Ind. App. 528, 532, 82 N. E. 1135.

It is shown by the evidence without conflict that Elias Hall, the decedent, died testate at Tipton County, Indiana, in July, 1907, the owner in fee simple of the land described in the complaint; that he left surviving him no children, nor their descendants, alive and neither mother nor father; that he left his widow, the appellant, Nancy R. Hall, as his sole surviving heir at law; that his will was duly probated on August 6, 1907; that the will contains the following provisions:

“Item 1. I give, devise and bequeath to my beloved wife, Nancy R. Hall, to have and to hold during her natural life, all my property, both personal and real,

for her comfort and support. I further authorize my said wife, to sell such part of my real estate, as she shall deem necessary for her comfort and support.

Item 4. After the payment and satisfaction of all the foregoing items, I give, devise and bequeath the remainder of my estate, both personal and real, to the Odd Fellows' Orphan Home at Greensburg, Decatur County, State of Indiana."

Appellant contends that by the foregoing provisions of the will, she is given a fee simple title to the real estate in controversy and appellees insist that she is only given

2. a life estate with limited power of disposition. The rule seems to be firmly established in this State, that where an estate in lands is given to a person generally or indefinitely with a power of disposition, it carries the fee, but if the testator by clear and definite language expressly gives to the first taker an estate for life only, coupled with a power of disposition, the express limitation of the grant to an estate for life controls, and the devisee for life will not take an estate in fee, but for life only, with such power of disposition as the instrument, by which the title is obtained, authorizes. *Beatson v. Bowers* (1910), 174 Ind. 601, 605, 91 N. E. 922; *Mulvane v. Rude* (1896), 146 Ind. 476, 482, 45 N. E. 659; *Wiley v. Gregory* (1893), 135 Ind. 647, 652, 35 N. E. 507; *Rusk v. Zuck* (1897), 147 Ind. 388, 394, 45 N. E. 691, 46 N. E. 674; *Dunning v. Vandusen* (1874), 47 Ind. 423, 425, 17 Am. Rep. 709; *Foudray v. Foudray* (1909), 44 Ind. App. 444, 446, 89 N. E. 499; *Wood v. Robertson* (1888), 113 Ind. 323, 324, 15 N. E. 457.

It is asserted by appellant that there is no such organization or institution known as "The Odd Fellows' Orphan Home at Greensburg, Decatur County, Indiana", the

3. devisee named in the fourth clause of the testator's will, and that for such reason there is no person or legal entity designated to take and hold the residuary estate devised by the fourth clause of the testator's will; that appellant, the widow and only heir of the decedent,

cannot be deprived of the property by such uncertain and indefinite provision. The pole star in the construction of a will is the intention of the testator. To ascertain and carry into effect such intention, courts may hear evidence of extrinsic facts and circumstances, not for the purpose of varying or modifying the provisions of the will, but to remove latent ambiguities and to enable the court to identify either the subject-matter or object of the testator's bounty. *Dennis v. Holsapple* (1897), 148 Ind. 297, 47 N. E. 631, 62 Am. St. 526, 46 L. R. A. 168; *Hartwig v. Schiefer* (1897), 147 Ind. 64, 46 N. E. 75; *Chappell v. Missionary Society* (1892), 3 Ind. App. 356, 29 N. E. 924, 50 Am. St. 276; *Skinner v. Harrison Tp.* (1888), 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137; *Miller v. Coulter* (1901), 156 Ind. 290, 293, 59 N. E. 853. In *Pate v. Bushong* (1903), 161 Ind. 533, 540, 69 N. E. 291, 100 Am. St. 287, 63 L. R. A. 593, the court said: "It is well established that however many errors there may be in a description, either of the devisee or the subject of the devise, it will not avoid the bequest if after rejecting the errors or false words, enough remains to show with reasonable certainty what was intended when considered from the position of the testator." In the case of *Skinner v. Harrison Tp.*, *supra*, the will under consideration devised certain real estate to Harrison Township and it was contended the will was void for uncertainty, because it did not indicate whether the devisee was the civil or school township, or the Harrison Township of any particular county, it being asserted that there are twenty-two townships of that name in the State of Indiana. It was held that the court rightly admitted extrinsic evidence to show the testator resided in Harrison Township of Cass County, Indiana, and that he sustained peculiar relations to that township, to enable the court to ascertain with certainty the intended devisee. In *Woman's Foreign Mis. Soc. v. Mitchell* (1901), 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711, the devise was to the "Board of Managers of the Foreign

Missionary Society of the Methodist Episcopal Church'' for the education of girls in India, and the bequest was decreed to the Woman's Foreign Missionary Society of said church, there being no body or society by the former name and the latter organization being shown to be the only foreign missionary society of said church engaged in the work to which the legacy was to be devoted.

In this case the court received extrinsic evidence to show that the Odd Fellows' Home at Greensburg, Decatur County, Indiana, is the only institution of the kind in the State of Indiana; that the decedent was an odd fellow and interested in the institution; that he talked to his friends about it, made inquiry as to its name and expressed an intention of doing something for the institution. The jury by answers to interrogatories found that the Odd Fellows' Home built on land conveyed to the Rebekah Assembly, Independent Order of Odd Fellows at the city of Greensburg, Decatur County, Indiana, was, and is, the only institution of the kind in the State of Indiana; that the decedent had knowledge of the existence of the institution prior to, and at the time of the execution of his will, and that the same was known to him by the name "Odd Fellows' Orphan Home at Greensburg, Decatur County, Indiana"; that said institution was in operation as a home for aged and indigent odd fellows, their wives, widows and orphans of the State of Indiana, at and prior to the time of the execution of the will, and subsequent thereto, and is still maintained and operated. The evidence and findings were sufficient to remove any uncertainty as to the devisee intended, and to enable the court to know that there was an institution sufficiently designated in the will, capable of receiving the bequest and carrying out the intention of the testator.

4. The general verdict finds every issuable fact in favor of appellees and we have no power to disturb such finding on the record as presented.

Objection is made to that part of instruction No. 2 given

by the court of its own motion, which reads as follows:

“You have a right to ascertain his intention, from
5. what he has written in his will, together with the surrounding circumstances and as it is written it must stand.” It is claimed that the instruction authorized the jury to consider circumstances not shown by the evidence. However, the court in other instructions, definitely and clearly stated to the jury that in ascertaining the intention of the testator, they should consider the language of the will and the facts and circumstances relative thereto shown by the evidence. The general statement made in instruction No. 2 when considered with the other definite instructions on the subject, which clearly limited the jury to a consideration of the facts and circumstances shown by the evidence, makes it clear that the instruction, though subject to criticism, did not harm the appellant.

The objections urged to other instructions are answered by our decision of the questions already discussed and do not require further consideration. It is not clear

6. from the appellant's briefs that any questions as to the evidence are intended to be presented, but there is a suggestion of error in admitting in evidence the certificate of election of the trustees of the Rebekah Assembly, Independent Order of Odd Fellows. No objection or exception is shown to have been made or reserved in regard thereto and it has been held many times that a mere suggestion of error or even a general objection is not sufficient to present any question as to the admissibility of evidence. Furthermore, appellant has waived any ques-

7. tion relating to the evidence by failure to state any propositions or points relating thereto, or to sustain the same by discussion or citation of authority. Also by wholly failing to set out in the briefs, a condensed recital of the evidence in narrative form as required by Rule 22.

Furthermore, our decision as to the title taken by appellant under the will and as to the identity of the devisee

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under the fourth clause thereof, makes it apparent
8. that a correct result was reached by the trial court and that substantial justice has been done between the parties. This being true, the court will not disturb the judgment of the lower court on alleged intervening errors that do not affect the substantial rights of the parties. §§407, 700 Burns 1908, §§398, 658 R. S. 1881; *March v. March* (1912), 50 Ind. App. 293, 98 N. E. 324; *Chicago, etc., R. Co. v. Murphy* (1913), 54 Ind. App. 531, 101 N. E. 829; *St. Clair v. Princeton Coal, etc., Co.* (1912), 50 Ind. App. 269, 98 N. E. 197.

No available error has been presented, and it appearing that since the submission of this cause, the appellant has died, the judgment of the lower court is affirmed as of the date of submission.

NOTE.—Reported in 103 N. E. 854. As to devise or bequest for life with power of disposal, see 139 Am. St. 82. As to the estate created by a grant or devise of a life estate with an absolute power of disposition, see 9 Ann. Cas. 947; Ann. Cas. 1912 B 424. See, also, under (1) 2 Cyc. 1013; (2) 40 Cyc. 1580, 1624; (3) 40 Cyc. 1386, 1392, 1469; (4) 38 Cyc. 1869; (5) 38 Cyc. 1621, 1782; (6) 38 Cyc. 1375, 1378; (7) 2 Cyc. 1013; 3 Cyc. 388; (8) 3 Cyc. 443.

PATTERSON, ADMINISTRATRIX, v. STATE BANK OF CHRISMAN.

[No. 8,621. Filed October 14, 1913. Rehearing denied January 8, 1914.]

1. **CONTRACTS.—Construction.**—As a rule, where the terms of a contract are of doubtful or ambiguous meaning, the construction given and acted upon by the parties themselves in respect to same, will be adhered to by the court. p. 335.
2. **APPEAL.—Review.—Motion for Judgment on Answers to Interrogatories.**—In reviewing the ruling on a motion for judgment upon answers to interrogatories, the court considers only the pleadings, interrogatories and answers, and the general verdict. p. 336.
3. **TRIAL.—Verdict.—Scope.—Answers to Interrogatories.**—A general verdict for plaintiff determines all the material allegations

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of the complaint in favor of the pleader, and carries with it every presumption and inference of fact which might have been drawn from evidence properly admissible under the issues, and it is overcome by answers to interrogatories only when they are in such irreconcilable conflict with it that both cannot stand. p. 336.

4. **CONTRACTS.—Construction.—Authority to Sign Note.**—In an action on notes signed in the names of defendant's intestate, his son and his son's partner, where plaintiff claimed that the son was authorized to affix intestate's name to the notes by virtue of a writing providing that intestate, his son and his son's partner would stand together in support of the firm and that "we grant the right of our names to be used jointly and to be signed by either one" of the parties, answers by the jury to interrogatories that intestate authorized the signing of his name to the notes in suit and that his name was signed by his son, show that the parties themselves construed the writing to mean that intestate's son had authority to sign his father's name to such notes. p. 337.
5. **APPEAL.—Review.—Verdict.—Evidence.—Sufficiency.**—In an action on a claim against an estate, where there was evidence to sustain every material allegation of the claim, the evidence was sufficient to support the verdict for claimant. p. 337.
6. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—Although as a rule communications between a husband and wife are privileged, the action of the court in permitting the widow of an intestate to testify to some conversation with her husband with respect to his interest in a store operated in the names of intestate's son and another, whose names, with that of intestate, appeared upon the notes sued on, for the purpose of showing that intestate was principal and not surety on the notes in question, was neither harmful as to that issue where the finding was that intestate was merely surety, nor as to the principal issue involving the question of the authority of intestate's son to affix his father's name to the notes, where it appears that the verdict was in no way influenced thereby. p. 337.
7. **TRIAL.—Province of Court and Jury.—Construction of Instruments.**—That the construction of a written instrument was a question of law for the court did not render its admission in evidence erroneous, since such admission in no way affected the duty of the court to construe and give legal effect to the instrument. p. 338.
8. **EXECUTORS AND ADMINISTRATORS.—Claims.—Contracts of Suretyship.—Statutes.**—The wisdom of the provisions of §2831 Burns 1908, §2313 R. S. 1881, providing that before an estate of a decedent may be resorted to to coerce the payment of a note upon which he is surety, it must be shown that the principal is insolvent, or is a nonresident of the State, is purely a legislative ques-

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tion, and the courts cannot disregard its plain provisions, even where the note sought to be enforced was executed in another state by nonresidents of this State and payable to a nonresident who seeks its enforcement. p. 338.

9. **PRINCIPAL AND SURETY.**—*Actions Against Surety.*—*Laches.*—

Where notes held by a bank upon which a decedent was surety became due in April and May following the death of decedent in November, and active efforts for the collection of the notes began early in the year succeeding the year of their maturity, and prior to the institution of suit thereon various deposits were made in plaintiff bank to the credit of the principals thereon, the delay in suing together with plaintiff's failure to apply such deposits to the payment of the notes did not constitute laches preventing a recovery against the surety's estate. p. 338.

10. **BANKS AND BANKING.**—*Deposits.*—*Application on Debts Due Bank.*—

While a bank may have the right to apply deposits towards the discharge of a debt due it from the depositor, it is not obliged to do so. p. 339.

11. **EQUITY.**—*"Laches".*—

Laches is defined to be "such neglect or omission to do what one should do as warrants the presumption that he has abandoned his claim and declined to assert his right", and the question of what amounts to laches in a given case is for the sound discretion of the court, dependent upon the particular facts and circumstances. p. 339.

12. **APPEAL.**—*Questions Reviewable.*—*Instructions.*—*Record.*—

The writing of the words "refused and excepted to" at the end of instructions requested and refused by the court, followed by the signature of the attorneys reserving the exceptions and the date, and the words "given and excepted to", together with like signature and date, at the close of instructions given, did not serve to bring the instructions into the record either under §660 Burns 1908, §629 R. S. 1881, or under §§558, 559, 560 Burns 1908, §§533, 534, 535 R. S. 1881, and, in the absence of proper authentication by the signature of the judge, they were not in the record under §561 Burns 1908, Acts 1907 p. 652, nor could they be considered for the further reason that the record disclosed no order book entry or order of the court showing the filing of the instructions in accordance with §691 Burns 1908, §650 R. S. 1881. p. 339.

From Madison Circuit Court; *Charles K. Bagot*, Judge.

Action by the State Bank of Chrisman against the estate of Silas M. Busby, deceased, and from a judgment for plaintiff, the administratrix appeals. *Affirmed.*

Sparks L. Brooks and *Kittinger & Diven*, for appellant.

W. S. Ellis and *Alfred Ellison*, for appellee.

SHEA, J.—This action was brought by appellee against the estate of Silas M. Busby, deceased, upon two promissory notes alleged to have been executed by Leonidas F. Busby, Bloomer W. James and Silas M. Busby, under the names and styles of L. F. Busby, B. W. James and S. M. Busby, and filed with the clerk of the Madison Circuit Court as a claim against said estate. Appellee's amended claim not being allowed or disallowed by the administratrix, Lillie Patterson, within sixty days, the same was entered upon the court's claim docket for trial. Appellant's demurrer thereto was overruled. The issues formed were tried by court and jury, resulting in a verdict and judgment for appellee.

With its general verdict, the jury returned answers to eleven interrogatories. The overruling of appellant's motion for judgment in its favor upon the interrogatories and answers notwithstanding the general verdict, and the overruling of its motion for a new trial are the errors relied upon for a reversal of this cause.

The first note in suit reads as follows:

“Chrisman, Illinois, Oct. 15, 1908.

\$1,000.00. Six months after date, we, or either of us, promise to pay to the order of The State Bank of Chrisman One Thousand and No/100 Dollars, payable at the office of said bank, in Chrisman, Illinois, for value received, with interest at the rate of seven per cent per annum after date until paid, and if not paid at maturity and put in an attorney's hands for collection, we agree to pay ten per cent attorney's fee on the amount due. The drawers and endorsers severally waive presentment, protest, and notice of protest of nonpayment of this note. L. F. Busby. B. W. James. S. M. Busby.

Due April 15, 1909.”

The second note is an exact copy of the first except that it is for \$3,000, dated November 18, 1908, and due May 18, 1909.

The facts as found by the jury in answer to interrogatories,

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are substantially, that decedent, Silas M. Busby, in person, signed and executed the following instrument introduced in evidence, and designated as exhibit A:

“We the undersigned do agree that we will stand together and support the firm of B. W. James and L. F. Busby and we grant the right of our names to be used jointly and to be signed by either one of the persons signed below.

Dated Sep. 25, 1906. B. W. James. L. F. Busby.
S. M. Busby.”

That Silas M. Busby did not sign the notes in suit, but by written agreement authorized B. W. James and L. F. Busby to do so, and his name was signed thereto by L. F. Busby; that B. W. James and L. F. Busby were principals on said notes and S. M. Busby was surety; that claimant had knowledge that the name of Silas M. Busby was signed to the notes in suit as surety by his son, Leonidas F. Busby; that both B. W. James and L. F. Busby are nonresidents of the State of Indiana.

It is urged by appellant that the written instrument above set out, did not authorize L. F. Busby to sign the name of Silas M. Busby to the negotiable instruments in question. Appellant states his case upon this point briefly as follows: “L. F. Busby signed the name of S. M. Busby to these notes and his only authority to do so was derived from this written agreement known as exhibit A. That the claimant knew that he signed the name to the notes and would thereby be bound by the limitations upon his authority. Now, since this agreement cannot, under any fair construction, be construed to authorize the execution of the notes in suit, it follows that the claimant has no cause of action against appellant and that there can be no recovery herein.” The written instrument in question is not certain in its terms. It was evidently drawn by a layman, rather than dictated by a legal mind. Under numerous authorities, the
1. construction given and acted upon by the parties themselves in respect to such contract, will, as a gen-

eral proposition, be adhered to in this court. *Scott v. Lafayette Gas Co.* (1908), 42 Ind. App. 614, 620, 86 N. E. 495; *Ralya v. Atkins & Co.* (1901), 157 Ind. 331, 61 N. E. 726; *Frazier v. Myers* (1892), 132 Ind. 71, 31 N. E. 536, and authorities cited; *Louisville, etc., R. Co. v. Reynolds* (1889), 118 Ind. 170, 20 N. E. 711. In the case of *Indiana, etc., Oil Co. v. Stewart* (1910), 45 Ind. App. 554, 90 N. E. 384, the court says: "The rule is that where a contract is ambiguous, the situation of the parties and the facts and circumstances may be considered in determining the actual intent and meaning of the parties, as expressed by the language used. The contract as made is the one to be enforced. [Citing authorities.] It is also true 'that when the terms of a contract are of doubtful or ambiguous meaning, the construction placed on same by the parties, by their conduct and acts, may be shown for the purpose of arriving at their true intention. The construction placed on such a contract by the parties is entitled to great weight and may be controlling. * * *' [Citing authorities.]"

In passing upon the correctness of a ruling on a motion for judgment upon the interrogatories and answers thereto, notwithstanding the general verdict, our investigation is confined to the pleadings, interrogatories and answers, and the general verdict. The general verdict determines all the material allegations of the complaint in favor of the pleader, and carries with it every presumption and inference of fact which might have been drawn from evidence properly admitted under the issues. The answers to interrogatories overcome the general verdict only when they are in such irreconcilable conflict therewith that both can not stand. *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 53 N. E. 235; *Chicago, etc., R. Co. v. Fretz* (1910), 173 Ind. 519, 528, 90 N. E. 76; *Cleveland, etc., R. Co. v. Harvey* (1910), 45 Ind. App. 153, 90 N. E. 318; *City of Jeffersonville v. Gray* (1905), 165 Ind. 26, 74 N. E. 611.

We think we need not go beyond the interrogatories themselves to determine the construction given to the agreement by the parties. Interrogatories Nos. 4 and 5 find expressly that Silas M. Busby authorized B. W. James and L. F. Busby to sign his name to the particular notes sued on in this case. Interrogatory No. 6 finds that L. F. Busby signed the name of Silas M. Busby to the notes in question, so we think the very able argument of appellant's learned counsel with respect to the construction of written instruments, and the application of legal principles thereto, while stating the law correctly, has no application to the facts in this case. The parties themselves construed the writing to mean that L. F. Busby had authority to sign the name of S. M. Busby to these notes.

Under the second error assigned, appellant argues that the evidence does not sustain the verdict. We have examined the evidence with some care, and feel that

5. there was evidence heard by the jury which would sustain every material allegation contained in the amended claim, and was therefore sufficient.

It is next insisted that the court erred in admitting and excluding certain evidence. Mrs. Busby, wife of decedent, was permitted to testify with regard to some conversation with her husband with respect to his interest in the store in question. Communications between husband and wife are as a rule privileged. It is insisted on behalf of appellee that this evidence was admitted for the purpose of showing that decedent was principal and not surety on the note in question. Upon this issue, the finding of the jury was that S. M. Busby was surety, so that no harm resulted. The principal issue in the case was as to whether S. M. Busby executed a certain written instrument in the record as exhibit A, and as to whether such instrument, if so executed, authorized L. F. Busby to sign his name to the notes in suit. As to that issue, we think

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the evidence was of such slight consequence as not to have influenced the verdict in any way, and therefore if the admission of this evidence could be held to be error, it was harmless. *Robbins v. Masteller* (1897), 147 Ind. 122, 46 N. E. 330; *Halstead v. Vandalia R. Co.* (1911), 48 Ind. App. 96, 103, 95 N. E. 439.

It is also urged that the court erred in admitting the written instrument exhibit A in evidence, for the reason that the construction of this instrument was a question of law for the trial court. We think that no error was committed in this, as the mere admission of the instrument in evidence in no sense affected the duty of the court to construe and give legal effect to the instrument.

No error was committed in the admission of the evidence of C. W. Newkirk, or the refusal to permit Lillie Patterson to testify as to her knowledge of the claim.

Section 2831 Burns 1908, §2313 R. S. 1881, provides that before the estate of a decedent may be resorted to, to coerce the payment of a note upon which he is surety, it must be shown that the principal was insolvent, or was a nonresident of the state. There is no dispute that B. W. James and L. F. Busby were at all times while the action was pending, nonresidents of the State of Indiana. While this provision of the statute is severely criticised by appellant's learned counsel, and this court is not prepared to say there is not some merit in the criticism, it is purely a legislative question. This court can not disregard the plain provisions of the statute.

There is also an earnest argument made that appellee was guilty of such laches as ought to prevent a recovery. The notes were executed in October and November of 1908, and Silas M. Busby died on November 26, 1908, a short time thereafter. The notes became due in April and May, 1909. Active efforts began for the collection of the notes early in 1910. During the period between

the death of Silas M. Busby and the institution of
10. suit to collect the notes, various deposits were made
in appellee bank to the credit of the firm of B. W.
James and L. F. Busby. It is complained that these deposits
should have been applied to discharge the debt evidenced
by the notes. While it may be true that the bank had a
right to apply the deposits so made toward the discharge of
this debt, it was not obliged to do so. The evidence in this
case does not convince the court that appellee was guilty
of laches by its failure to apply such credits. Laches

11. is defined to be "such neglect or omission to do what
one should do as warrants the presumption that he
has abandoned his claim and declined to assert his right."
Anderson, Law Dict. See, also, *Wissler v. Crain* (1885),
80 Va. 22, 30. "What would be laches in one case, might
not constitute such in another. The question is one ad-
dressed to the sound discretion of the court, depending upon
all the facts of the particular case." 5 Words and Phrases.
See, also, *The Queen of the Pacific* (1894), 61 Fed. 213, 216.
In the case of *Wood v. State, ex rel.* (1900), 155 Ind. 1,
55 N. E. 959, which was a suit to compel by mandate pay-
ment of a certain sum of money out of a particular fund,
it is held that the mere delay for the time mentioned (six-
teen months) can not be considered unreasonable or laches
of such a character as will alone defeat an action.

Error is also predicated on the action of the court in
giving and refusing to give certain instructions. It is
earnestly insisted by appellee that such error can not

12. be considered, for the reason that the instructions
are not in the record. At the end of instructions
Nos. 2, 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15 and 16 tendered
by appellant and refused by the court, this notation is
found: "Refused and excepted to, Sparks L. Brooks, Kit-
tinger & Diven, attorneys for defendant, Nov. 30th, 1910."
Of those given by the court, at the close of Nos. 6, 7, 8, 9,
10, 11, 15, 16 and 18, this notation appears: "Given and

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excepted to, Kittinger & Diven, S. L. Brooks, attys. for defendant, Nov. 30th, 1910.” It is clear that the instructions are not brought into the record by a bill of exceptions as provided by §660 Burns 1908, §629 R. S. 1881. They are not made a part of the record in accordance with the provisions of §§558, 559, 560 Burns 1908, §§533, 534, 535 R. S. 1881. *Petrie v. Ludwig* (1908), 41 Ind. App. 310, 83 N. E. 770; *Malott v. Hawkins* (1902), 159 Ind. 127, 138, 63 N. E. 308; *Oglebay v. Tippecanoe Loan, etc., Co.* (1908), 41 Ind. App. 481, 82 N. E. 494. They are not properly in the record under the provisions of §561 Burns 1908, Acts 1907 p. 652, because they are not authenticated by the signature of the judge as required by the provisions of this section. *Strong v. Ross* (1905), 36 Ind. App. 174, 75 N. E. 291; *Cleveland, etc., R. Co. v. Powers* (1909), 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485; *Wiseman v. Gouldsberry* (1910), 45 Ind. App. 677, 91 N. E. 616; *Fowler v. Fort Wayne, etc., Traction Co.* (1910), 45 Ind. App. 441, 91 N. E. 47; *Indianapolis, etc., R. Co. v. Ragan* (1909), 171 Ind. 569, 86 N. E. 966; *Newsom v. Chicago, etc., R. Co.* (1913), 52 Ind. App. 577, 101 N. E. 26.

It has been repeatedly held by both this court and the Supreme Court that the record must disclose an order book entry showing the filing of instructions. After a diligent search of the record in this case we are unable to find any order book entry or order of court showing the filing of instructions in accordance with §691 Burns 1908, §650 R. S. 1881. *Tell City Canning Co. v. Wilbur* (1910), 46 Ind. App. 550, 93 N. E. 174; *Close v. Pittsburgh, etc., R. Co.* (1898), 150 Ind. 560, 50 N. E. 560; *Russ v. Russ* (1895), 142 Ind. 471, 474, 41 N. E. 941; *Board, etc. v. Gibson* (1902), 158 Ind. 471, 63 N. E. 982; *Newsom v. Chicago, etc., R. Co.*, *supra*. So it appears that appellant has not come strictly within the provisions of any section of the statute in incorporating the instructions in the record.

There being no error in this case, the judgment is affirmed.

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NOTE.—Reported in 102 N. E. 880. As to privileged communications between husband and wife, see 29 Am. St. 411; 106 Am. St. 763. See, also, under (1) 9 Cyc. 588; (2) 38 Cyc. 1930; (3) 38 Cyc. 1869, 1929; (5) 3 Cyc. 348; (6) 38 Cyc. 1435; (7) 38 Cyc. 1522; (8) 36 Cyc. 1103; (9) 32 Cyc. 228; (10) 5 Cyc. 554; (11) 16 Cyc. 152; (12) 38 Cyc. 1769.

CITY OF HUNTINGTON v. KAUFMAN.

[No. 7,483. Filed January 30, 1912. Rehearing denied April 24, 1912. Transfer denied January 8, 1914.]

1. APPEAL.—*Review.*—*Findings.*—*Exceptions to Conclusions of Law.*—On appeal to the circuit court by a property owner from an assessment levied for street improvements, based upon the proposition that his property was not benefited in any sum, but that he was damaged in the sum of \$500, exceptions to conclusions of law stated by the trial court that his property was not benefited in any sum, that it was damaged in the sum of \$500, and that he should recover that amount from the city as damages, were not well taken, since such exceptions conceded that the facts were fully and correctly found. p. 343.
2. APPEAL.—*Review.*—*Findings.*—*Ruling on Motion for Venire de Novo.*—Where the special findings of fact were free from ambiguity, the overruling of a motion for a *venire de novo* was not erroneous, since such a motion reaches matters of form and can only be sustained when the findings are so defective and uncertain that no judgment can be rendered thereon. p. 344.
3. TRIAL.—*Venire de Novo.*—*Grounds.*—The failure to find material facts in a special finding is not cause for a *venire de novo*. p. 344.
4. EXCEPTIONS, BILL OF.—*Time of Presentation.*—*Extensions.*—*Statutes.*—In order to secure an extension of the time for preparing and presenting a bill of exceptions, a proper application and showing therefor under oath must be made before the expiration of the time first allowed, as provided in §661 Burns 1908, Acts 1905 p. 45, and an affidavit filed after the expiration of the time first given, explaining the cause of delay, is insufficient; hence where the certificate to a bill of exceptions discloses that the bill was presented on the day before the time limit expired, that it was then incomplete, and that it was thereafter presented to the court with additions and accompanied by an affidavit explaining the cause of delay, the evidence therein contained was not properly in the record. p. 345.

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5. **APPEAL.—*Right of Appeal.***—The right of appeal is a right conferred only by statute, and it must be exercised in conformity with the rules provided by statute. p. 345.
6. **APPEAL.—*Questions Reviewable.—Record.—Evidence.***—Where the evidence relating to the issues joined in a prior suit between the parties is not in the record on appeal from the judgment rendered in a subsequent action, the court, on appeal, cannot determine what questions were or might have been determined in such prior suit. p. 346.

From Huntington Circuit Court; *Joseph W. Adair*, Special Judge.

Proceedings by the City of Huntington for the assessment of land for street improvements. From a judgment awarding damages to Roscoe A. Kaufman, the city appeals. *Affirmed.*

William D. Hamer, for appellant.

C. W. Watkins, R. A. Kaufman and *Charles A. Butler*, for appellee.

ADAMS, J.—Appellee was the owner of certain real estate in the city of Huntington, which was assessed for street improvements, and from which assessment appellee appealed to the Huntington Circuit Court. Issues were joined on the transcript of all the proceedings, and acts of the city relative to the improvement, and the remonstrance of the appellee, who was the defendant below. Upon request, the court made a special finding of facts, and stated conclusions of law thereon, from which finding, it appears that on December 24, 1901, the common council of the city of Huntington passed a resolution for the improvement of North Jefferson Street in that city, by paving with vitrified brick to a width of thirty feet, and with a sidewalk six feet wide on each side of the improved roadway. The real estate of the appellee was assessed as benefited by the improvement in the sum of \$383.44. Notice of the assessment was given to the owners of the real estate affected, and appellee appeared and filed his remonstrance, alleging therein that his property was not benefited in any sum by the improvement,

but that he was damaged thereby in the sum of \$500. The assessment against the property of appellee was ratified on May 31, 1904, and ordered placed upon the tax duplicate. On June 1, 1904, appellee filed his bond, and took an appeal to the circuit court. It is also found that the contractors in constructing the work made a cut into the property of the appellee, seven and one-half feet deep, ninety feet long, and twenty-six inches wide, immediately west of the west line of the street, destroying three large shade trees, all without right or authority of law; that the cutting of appellee's lot and grading of the street, left the lot inaccessible, inconvenient, and did not increase the value thereof, but was an injury and damage to the same in the sum of \$500; that the contract called for the construction of a six-foot sidewalk for the full length of appellee's property, but that no sidewalk was ever built, and no excavation for a sidewalk was made, and that the city, with full knowledge that no sidewalk had been built in front of the property of appellee, accepted the work from the contractors; that on July 15, 1903, and after the cut was made on appellee's property as aforesaid, and after appellee had suffered the loss of shade trees, as herein set out, he filed his complaint in the Huntington Circuit Court to enjoin the city from further cutting down his lot and from further injuring his shade trees; that issues were duly joined on the complaint, and upon the hearing, the city was enjoined from further cutting appellee's lot and further injuring his shade trees, and judgment was rendered in favor of appellee for nominal damages, in the sum of \$10, which judgment has not been set aside nor appealed from.

Upon these facts, the court stated as conclusions of law that the property of the appellee is not benefited by the improvement; that the same is damaged in the sum

1. of \$500, and that appellee should recover from the city the sum of \$500, as damages. Exceptions were separately and severally taken by the city to each conclu-

sion of law, and separately assigned as error on appeal. The assignment of errors also specifies the overruling of the motion for a *venire de novo* and the overruling of the motion for a new trial. The errors predicated on each conclusion of law stated by the court are not well taken. For the purpose of determining this question, we must take the finding as not only speaking the truth, but the whole truth in regard to the facts of the case. Appellant's exceptions concede that the facts are not only correctly found, but are fully found. *National State Bank v. Sanford Fork, etc., Co.* (1901), 157 Ind. 10, 60 N. E. 699; *Blair v. Curry* (1898), 150 Ind. 99, 46 N. E. 672, 49 N. E. 908; *Warren v. Sohn* (1887), 112 Ind. 213, 13 N. E. 863; *City of Indianapolis v. Board, etc.* (1902), 28 Ind. App. 319, 62 N. E. 715; *Ladd v. Kuhn* (1901), 27 Ind. App. 535, 61 N. E. 745. The finding being clear and free from ambiguity, it follows that

2. there was no error in overruling the motion for a *venire de novo*. This motion reaches matters of form, and can only be sustained when the finding is so defective and uncertain that no judgment can be rendered thereon. *Zink v. Dick* (1891), 1 Ind. App. 269, 27 N. E. 622; *Knight v. Knight* (1893), 6 Ind. App. 268, 33 N. E. 456; *Case v. Ellis* (1894), 9 Ind. App. 274, 36 N. E. 666; *Seiberling v. Tatlock* (1895), 13 Ind. App. 345, 41 N. E. 841; *Miller v. Stevens* (1899), 23 Ind. App. 365, 55 N. E. 262. Under

this specification of error, complaint is made that

3. the finding does not sufficiently show whether matters in issue were adjudicated in a former proceeding, and whether there was a prior established grade in the street, from which a change was made in the making of the improvement. The failure to find even material facts in a special finding is not cause for a *venire de novo*. *Waterbury v. Miller* (1895), 13 Ind. App. 197, 41 N. E. 383; *Durflinger v. Baker* (1898), 149 Ind. 375, 49 N. E. 276; *Jones v. Casler* (1894), 139 Ind. 382, 38 N. E. 812, 47 Am. St. 274.

The motion for a new trial calls in question the sufficiency of the evidence to support the finding, in the consideration of which we are met by the objection of the appellee

4. that the evidence is not in the record. The motion for a new trial was overruled, and 120 days were given appellant within which to present to the court its bill of exceptions. The time for presenting the bill expired on April 18, 1909. A bill was presented to the court on April 17, 1909, and it appears from the notation of the court that the same was presented for signature on that day, and taken under advisement for further examination. On June 12, 1909, the record shows that the appellant further tendered its bill of exceptions, containing a full, true and complete transcript of all the evidence in the cause. The court certifies that at the time of presenting the bill of exceptions on April 17, 1909, the same was not a true bill of exceptions, and did not contain twenty-two pages of evidence incorporated into the bill presented on June 12. The court further certifies that the appellant on June 12 tendered the affidavit of its attorney, showing cause for the delay in completing the bill, and that the same with the additions contained and attached since April 17, now contains a full, true and complete copy of all the evidence given in the cause. From this certificate of the court, it appears that the bill of exceptions presented in the first instance on the day before the time limit expired was not complete, and that the bill was again presented to the court on June 12, with said additions, and with the affidavit of the attorney showing the cause for delay. The right of appeal is a

5. right conferred only by statute, and it must be exercised in conformity with the rules provided by statute. Anticipating the possibility of parties being

4. unable to prepare and present bills of exceptions within the time given, the statute provides (§661 Burns 1908, Acts 1905 p. 45), that an extension of time may be secured upon a proper showing made under oath.

But, in order to secure such extension of time, the application must be made prior to the expiration of the time first allowed. An affidavit filed long after the expiration of the time first given, explaining the cause of delay, will not take the place of the affidavit required by this section of the statute. The bill of exceptions, as it comes to us, is shown to have been presented to the court long after the time given for presenting the same, and the evidence is, therefore, not in the record. Ewbank's Manual §31; *Citizens Bank v. Julian* (1900), 153 Ind. 655, 55 N. E. 1007; *Wysor v. Johnson* (1892), 130 Ind. 270, 30 N. E. 144.

It is claimed by the appellant that the act of the city in appropriating twenty-six inches of the property of the appellee for street purposes is not in this case, for the
6. reason that it was litigated in a prior suit. The finding shows that after the injury complained of by appellee in his remonstrance had been committed, but before the assessment against appellee's property was made, an action was commenced by appellee, seeking to enjoin the city from further cutting down his property, and from destroying other shade trees; that upon the hearing of the cause the city was enjoined, as prayed for, and damages awarded in a nominal sum. Without the evidence relating to the issues joined by the pleadings in the injunction proceeding, we are unable to say what questions were or might have been adjudicated in that action.

Finding no error in the record, the judgment is affirmed.

NOTE.—Reported in 97 N. E. 339. See, also, under (1) 38 Cyc. 1992; (2, 3) 38 Cyc. 1990; (4) 3 Cyc. 41; (5) 2 Cyc. 507; (6) 3 Cyc. 164.

BUTTZ v. WARREN MACHINE COMPANY.

[No. 8,111. Filed January 9, 1914.]

1. **APPEAL.—Decision.—Evidence.**—Where there is any evidence to support the decision of the trial court, a reversal on the ground of insufficient evidence will be denied. p. 348.
2. **PRINCIPAL AND AGENT.—Testimony of Agent.—Admissibility.**—The rule that the declarations of an alleged agent are not admissible against the alleged principal to prove the fact of agency does not disqualify an agent from testifying as to the authority given him by his principal, and the extent and character thereof, where such authority is verbal. p. 348.
3. **APPEAL.—Review.—Evidence.**—Where no objection was made to any evidence admitted on an issue, all the evidence in support of the decision of the trial court on that issue will be considered by the court on appeal. p. 348.
4. **PRINCIPAL AND AGENT.—Authority of Agent.—Evidence.—Sufficiency.**—The testimony of an agent that he had authority to purchase goods for his principal is sufficient to sustain a decision for plaintiff in an action against the principal for a breach of the contract of purchase. p. 348.

From Superior Court of Marion County (82,332); *Clarence E. Weir*, Judge.

Action by the Warren Machine Company against Frank C. Buttz. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Pritchard & Pritchard and *Roscoe Maddox*, for appellant.

Emsley W. Johnson, *Orval E. Mehring* and *Everett M. Schofield*, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor in the sum of \$268 rendered in an action for a breach of contract for the purchase of certain tools to be used for the digging of deep water wells. The error relied on for reversal is the overruling of appellant's motion for a new trial. It is admitted in effect that the tools were purchased of appellee by a man in the employ of appellant by the name of Freeman, and appellant in his brief concedes that the "sole question" presented by his appeal "upon

which he seeks a reversal of the finding and judgment below is that the agency of Mr. Freeman was not established by the evidence.” In support of this contention appellant says

that “there is not an item of evidence here as to the

1. existence of any authority to purchase except the testimony of Freeman himself. He stands alone.”

This admission renders unavailing appellant’s ground of appeal, because if there be any evidence to support the decision of the trial court on the question of agency, a reversal on account of the insufficiency of such evidence must be denied. *Chicago, etc., R. Co. v. Coon* (1911), 48 Ind. App. 675, 690, 93 N. E. 561, 95 N. E. 596, and authorities there cited. Appellant insists, however, that “the declarations

of an alleged agent are not admissible against the

2. alleged principal to prove the fact of agency.” This

general rule has been frequently announced and applied in cases involving agency; but appellant misconstrues its meaning if he understands that such rule disqualifies the agent from himself testifying as to the authority given him by his principal, and the extent and character thereof where such authority is verbal. *Wolf v. Smith* (1860), 14 Ind. 360; *Norden v. Duke* (1905), 106 App. Div. 514, 94 N. Y. Supp. 878; 1 Greenleaf, Evidence §416; Mechem, Agency §102.

In this case, it seems that no objection was made to any evidence admitted on the subject of agency and hence all the evidence on such subject in support of the decision

3. of the trial court will be considered by this court.

Metropolitan Life Ins. Co. v. Lyons (1912), 50 Ind. App. 535, 546, 548, 98 N. E. 824. The evidence on the subject of agency is sufficient to sustain the decision of

4. the trial court. Mechem, Agency §§283, 284; *Wagner v. McCool* (1913), 52 Ind. App. 124, 100 N. E.

395.

Judgment affirmed.

Carnahan v. Shull—55 Ind. App. 349.

NOTE.—Reported in 103 N. E. 812. As to admissibility of declarations of agent, see 131 Am. St. 306. See, also, under (1) 3 Cyc. 360; (2) 31 Cyc. 1652; (3) 2 Cyc. 693; (4) 31 Cyc. 1667.

CARNAHAN v. SHULL ET AL.

[No. 8,007. Filed June 19, 1913. Rehearing denied November 13, 1913. Transfer denied January 13, 1914.]

1. **TRIAL.—Findings.—Sufficiency.—Venire de Novo.**—If a finding of facts contains enough substance to support a judgment it will not be objectionable because it does not find all the issuable facts, and a *venire de novo* should not be granted unless the finding is so defective or uncertain on its face that it is incapable of supporting any conclusion of law or forming the basis of any judgment on the issues involved. p. 351.
2. **TRIAL.—Burden of Proof.—Findings.—Sufficiency.**—In an action against a husband and wife to foreclose a mortgage signed by both, where the note secured thereby was signed by the husband only, and plaintiff, to avoid the presumption that the debt was that of the husband alone, averred that the debt was their joint debt, a failure to find that the note and mortgage represented the joint debt of defendants, was equivalent to a finding of such fact against the plaintiff, who had the burden of proving the material allegations of his complaint, so that the findings, though defective, were sufficient to prevent a judgment against the wife. p. 352.
3. **TRIAL.—Conclusions of Law.—Exceptions.**—Exceptions to conclusions of law concede, for the purposes of the exceptions, that the facts are fully and correctly found. p. 352.

From Dekalb Circuit Court; *Frank M. Powers*, Judge.

Action by Perry Carnahan against Thomas Shull and another. From the judgment rendered, the plaintiff appeals. *Affirmed.*

P. V. Hoffman, for appellant.

Mountz & Brinkerhoff and *D. D. Moody*, for appellees.

FELT, J.—Appellees, husband and wife, owned twenty-five acres of land, as tenants by entirety, and executed a mortgage on the same to secure two notes, each for \$150, executed by appellee, Thomas Shull, to appellant. Appellant

brought suit on the notes and to foreclose his mortgage. The complaint in addition to the usual averments in such suits charged that the notes were given for the price of two horses sold by appellant to the appellees jointly; that appellee, Florence Shull, agreed to execute the notes and mortgage with her husband, but only executed the mortgage and did not sign the notes; that the notes and mortgage were delivered to appellant but he did not observe that she had failed to sign the notes. The complaint was answered by a general denial and two paragraphs of special answer, in one of which it was alleged that the land was owned by appellees as tenants by entireties and that the mortgage was executed to secure the separate debt of the husband. In the other, it was alleged in substance that the notes were given in payment for two horses bought by Thomas Shull and that Florence Shull, his wife, executed the mortgage as his surety. The reply was a general denial.

The appellant has assigned as error the overruling of his motion for a *venire de novo* and that the court erred in each conclusion of law. Upon request, the court made a special finding of facts, the substance of which is as follows: That appellees are, and on March 16, 1909, were husband and wife; that on said day they were the owners by entireties of the real estate described in the mortgage; that appellee, Florence Shull, agreed to execute two notes each for \$150 in payment for two horses purchased from appellant, and secured the same by mortgage on the real estate; that on said day appellees executed the mortgage but the notes were signed only by Thomas Shull; that appellee Thomas Shull delivered the notes and mortgage to appellant and requested him to examine the same but he did not do so but turned them over to his wife with a request that she examine them; that appellee Florence Shull was not present when the notes and mortgage were delivered and the horses turned over to her husband; that in the preparation and delivery of the instruments and in the purchase of the team, Thomas Shull

did not act as the agent of his wife and was not authorized so to do; that Florence Shull, when she executed the mortgage, did not intend to purchase the team either individually or jointly with her husband or to obligate herself to pay therefor, and only signed the mortgage as the wife of her husband; that she never at any time claimed to own the horses or to have any interest in them except as the wife of her husband and appellant never requested her to execute other or different notes from those delivered to him. The court stated as conclusions of law that the debt evidenced by the notes and mortgage is and was the debt of Thomas Shull and that the appellee Florence Shull was surety; that the mortgage is illegal and void; that appellant is entitled to a personal judgment against Thomas Shull for \$373.73 and \$40 attorney's fees. Judgment was rendered accordingly.

Appellant insists that his motion for a *venire de novo* should have been sustained for the alleged reason that the finding states only items of evidence and legal con-

1. clusions and fails to find the ultimate issuable facts; that the finding does not state the ultimate fact as to who purchased the horses and as to whether Florence Shull was surety for her husband. If a finding of facts contains substance enough to support a judgment one way or the other, it will not be objectionable because it does not find all the issuable facts. *Maxwell v. Wright* (1903), 160 Ind. 515, 520, 67 N. E. 267. In the recent case of *Geiger v. Town of Churubusco* (1912), 50 Ind. App. 685, 98 N. E. 77, this court said: "A *venire de novo* should not be granted unless the finding is so defective or uncertain on its face that it is incapable of supporting any conclusion of law or forming the basis of any judgment on the issues involved."

In this case, we are not called upon to decide whether the mortgage upon the land held by appellees as tenants by entireties would be a valid security for a joint debt of the husband and wife, for the reason that the finding of facts shows that the notes were executed only by the husband;

that the horses were bought by him, and his wife did not purchase them in her individual capacity or jointly with him, or claim any interest in them.

It is fundamental that a plaintiff must prove the material averments of his complaint. The notes sued on evidence

only a debt of the husband. To avoid the presump-

2. tion that the debt was that of the husband, appellant averred that the horses were sold to appellees jointly and that the debt was their joint obligation. The finding is against appellant on this issue and even if it be true as claimed, that the finding is defective and fails to find the ultimate and issuable facts, still upon this issue the result would be the same, for in the absence of a finding that the notes and mortgage evidence the joint debt of appellees, the appellant cannot succeed against the wife, for the failure to find a material fact is the equivalent of finding such fact against the party having the burden of proving the same. *Mug v. Ostendorf* (1911), 49 Ind. App. 71, 96 N. E. 780; *Maxwell v. Wright, supra*, 520. It follows that the finding of facts, though by no means commendable in form, is sufficient to support the judgment rendered. The appellant failed because he did not prove the material averments of his complaint. This is apparent from the finding of

3. facts, and the exceptions to the conclusions of law concede for the purposes of the exceptions, that the facts are fully and correctly found. *National State Bank v. Sanford Fork, etc., Co.* (1901), 157 Ind. 10, 15, 60 N. E. 699; *City of Indianapolis v. Board, etc.* (1902), 28 Ind. App. 319, 323, 62 N. E. 715. It is apparent therefore that the court did not err in overruling the motion for a *venire de novo* or in stating its conclusions of law.

Judgment affirmed.

NOTE.—Reported in 102 N. E. 144. For a discussion of an estate by entirety as subject to the claims of creditors of one spouse, see 12 Ann. Cas. 53; Ann. Cas. 1912 C 1242. See, also, under (1) 38 Cyc. 1966; (2) 38 Cyc. 1985; (3) 38 Cyc. 1992.

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**EVANSVILLE GAS AND ELECTRIC LIGHT COMPANY
v. ROBERTSON, ADMINISTRATRIX.**

[No. 7,612. Filed January 31, 1913. Rehearing denied June 3, 1913. Transfer denied January 14, 1914.]

1. **MASTER AND SERVANT.—Injuries to Servant.—Complaint.—Sufficiency.—Conclusions.**—A complaint containing a general charge of negligence against the master which resulted in the alleged injury to the servant will withstand a demurrer, and mere recitals and conclusions of the pleader as to particular acts will be treated as surplusage. p. 358.
2. **MASTER AND SERVANT.—Injuries to Servant.—Complaint.—Sufficiency.**—A complaint against an electric company for the death of a servant showing that decedent, in obedience to the order of the foreman under whom he was working, was at work at the top of a light pole on which were wires charged with heavy currents of electricity, which, if a circuit was formed, would produce instant death to one coming in contact therewith, that it was defendant's duty to properly insulate the decedent and otherwise provide for his safety while so engaged, and that defendant knew of the danger to decedent unless he was so protected, but notwithstanding such knowledge negligently failed to insulate and protect him, whereby decedent while in the performance of his work was electrocuted, was sufficient to withstand a demurrer. pp. 358, 359.
3. **PLEADING.—Complaint.—Allegations.—Sufficiency.**—The allegation, in a complaint for the death of a servant by contact with an electric wire, that "it was necessary for said deceased to be in close proximity to said feed wire", when considered with other allegations that the pole on which decedent was at work "carried a feed wire that was so heavily charged with electricity that to come in contact with the same so as to form a circuit would destroy human life; that the presence of said feed wire and its effect upon human life were known to defendant", and disclosing that decedent was ordered to go upon the pole to attach a guy wire to a cross arm, was sufficiently clear to enable the court to understand that decedent was required to be near the feed wire attached thereto. p. 359.
4. **MASTER AND SERVANT.—Injuries to Servant.—Actions.—Voir Dire Examination of Jurors.—Waiver of Error.**—In an action against an employer for the death of a servant, the error, if any, in permitting counsel for plaintiff to ask each juror on voir dire examination if he was either a stockholder, officer, employe or agent of a specified insurance company that had issued a policy

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to defendant indemnifying it against loss by reason of injury to its employes, was waived by defendant's failing to object to the submission of the cause, to move to set aside the submission, and to save exceptions to the rulings on such motions. p. 360.

5. **APPEAL.—Briefs.—Questions Considered.**—Although appellant's failure to set out in its brief the exact page and line of the record where all the instructions may be found was a technical violation of Rule 22, the defect did not bar a consideration of the questions in view of the fact that both appellant and appellee had filed helpful briefs containing much argument and citation of authorities. p. 361.
6. **MASTER AND SERVANT.—Injuries to Servant.—Trial.—Instructions.**—In an action for the death of a servant, the action of the court in setting out the entire complaint in an instruction, on the theory of giving the jury the material allegations thereof, though not in accord with approved practice, was not cause for reversal where it did not appear that appellant was harmed thereby. p. 361.
7. **MASTER AND SERVANT.—Injuries to Servant.—Trial.—Instructions.**—Where the court, in an action for the wrongful death of a servant, embodied the only remaining paragraph of complaint in its instruction on the material allegations, its failure therein to refer to the questions of contributory negligence and assumption of risk, and its inadvertent statement that the jury should find for plaintiff if the evidence preponderated in her favor, not only in respect to the material allegations of that paragraph, but if the evidence so preponderated as to any of the paragraphs, was harmless in view of other instructions given. p. 361.
8. **APPEAL.—Review.—Consideration of Instructions.**—The court on appeal in reviewing questions presented on the instructions, will consider such instructions as a whole. p. 361.
9. **APPEAL.—Review.—Instructions.**—In an action for the death of a lineman while at work on an electric light pole, neither an instruction objected to on the ground that the court usurped the right of the jury in saying directly what it was or was not the duty of decedent to do, nor one stating that unless decedent was guilty of some negligent act in touching the charged wire, he was not guilty of contributory negligence, was erroneous. p. 362.
10. **MASTER AND SERVANT.—Injuries to Servant.—Trial.—Instructions.**—In an action for the wrongful death of a servant an instruction setting out certain duties and stating that "a servant does not assume risks flowing from his employer's negligence in these duties", was not erroneous when its full context was considered with the other instructions given. p. 362.
11. **APPEAL.—Review.—Harmless Error.—Refusal of Instructions.**—Requested instructions were properly refused, where, in so far

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as they were correct, they were fully covered by the instructions given. p. 362.

12. MASTER AND SERVANT.—*Injuries to Servant.—Duty of Master.*

—An employer, while engaged in the maintenance of highly charged electrical wires on poles that its employes must ascend in the discharge of their duties, is bound to know the natural and ordinary hazards of the work, and must use care commensurate to the danger to eliminate such hazards while its employes, with its knowledge, are engaged in such work. p. 363.

13. MASTER AND SERVANT.—*Duty of Master.—Safe Place of Work.*

—The duty of a master in respect to the maintenance of a safe working place for its servants, especially when the work is among elements and appliances which are dangerous only in the absence of care on the master's part, imposes on the master the obligation to use active vigilance and care, and liability for a failure in this respect cannot be escaped on the theory that the master did not know that the servant would encounter the danger at the moment of its negligence. p. 364.

14. MASTER AND SERVANT.—*Master's Duty.—Safe Place of Work.—*

Delegation of Duty.—Where the place of work of an electric line-man became dangerous only in the event of the grounding of an uninsulated guy wire that he was attempting to attach to a pole, it was the duty of the master to use care commensurate with the danger to prevent the grounding of such wire, and such duty could not be delegated to a servant so as to allow the master to escape liability. p. 364.

15. APPEAL.—*Review.—Conclusiveness of Verdict.*—The court on

appeal will not disturb a verdict on the ground of insufficient evidence if there is any evidence to sustain it. p. 365.

From Gibson Circuit Court; *Herdis F. Clements*, Judge.

Action by Lena Robertson, as administratrix of the estate of Roy R. Robertson, deceased, against the Evansville Gas and Electric Light Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Elmer E. Stevenson and *Iglehart, Taylor & Hartman*, for appellant.

Philip W. Frey, F. J. Pentecost, Lucius C. Embree and *Morton C. Embree*, for appellee.

SHEA, J.—This was an action by appellee against appellant to recover damages for the death of her deceased husband, Roy R. Robertson, alleged to have been caused by the

negligence of appellant. The complaint was in four paragraphs, to each of which a demurrer for want of facts was overruled. Appellant answered by a general denial. At the close of the evidence, appellee dismissed the first, second and third paragraphs of complaint, and the cause was submitted to a jury on the fourth paragraph. A general verdict was returned in favor of appellee and judgment rendered on the verdict. Appellant's motion for a new trial was overruled. The errors assigned are, the overruling of the demurrer to the fourth paragraph of complaint, and the overruling of appellant's motion for a new trial.

From the complaint it appears, in substance, that appellant was a corporation engaged in furnishing electric light and power by means of electricity to its customers in the city of Evansville, Indiana; that it maintained poles in that city, upon which wires were strung upon cross arms attached thereto, by means of which it distributed electric currents; that these poles are kept in position by means of wire ropes extending from them to guy poles. Appellee's decedent was employed by appellant as a lineman. One pole was located at the corner of Sixth Avenue and Franklin Street, carrying what is known as a feed wire, charged with a voltage of electricity sufficient, when a circuit was formed, to kill instantly any person coming in contact with it. Near the opposite corner on which the pole was situated, appellant maintained a guy pole, from which wires were stretched, designed to steady and keep the main pole in an upright position. On June 2, 1906, appellant had in its employ one Dan McDonald whose duties were to superintend and direct the repair and construction of its poles and lines, and who was authorized to determine when repairs were needed, and to direct the manner in which they should be made. On said day, appellant, by McDonald, determined to strengthen the pole on the corner of Sixth Avenue and Franklin Street by guying it. The pole, at that time, carried a feed wire so heavily charged with electricity that to come in contact

with it so as to form a circuit, would destroy human life, and the presence and effect of this feed wire were known to appellant. It was the duty of decedent, under the order of McDonald to climb the pole and make such tests and attachments thereto as directed by him. Appellant's rules required it to fully protect persons sent upon such poles in the line of their employment, and it therefore undertook to protect and insulate decedent while engaged in his work in such dangerous place. On the day of the accident, decedent was directed to go upon the pole, and did, in the line of his duty, climb it to attach a guy wire thereto. In so doing it was necessary for him to be in close proximity to the feed wire. When decedent climbed the pole, McDonald was on the ground near the foot of it for the purpose of insulating and protecting him. A guy wire was then sent up to decedent, who, realizing the danger of the feed wire, and relying wholly upon appellant to protect and insulate him in accordance with its rules and practices, undertook to fasten the guy wire to the pole; that appellant negligently failed and refused to insulate or protect decedent, of which failure he had no knowledge or means of knowledge, for the reason that his attention was confined to the work he was engaged in doing, and also because the end of the guy wire where it was near the ground was quite a distance from the pole; that appellant negligently failed to insulate the end of the guy wire on or near the ground, and the guy wire, coming in contact with the ground, formed a circuit which, when the decedent came in contact with the feed wire, caused his death. Appellant negligently failed to warn decedent that the guy wire was not properly insulated; that the coming in contact with the feed wire, in the handling of the guy wire, was without fault on the part of decedent; that such contact would not have injured decedent in any manner had the guy wire been properly insulated; that decedent at the time of his injury was in the exercise of due care, and did not know and could not know that the guy wire, at the

time of his injury, was not properly insulated; that decedent would not have gone upon the pole and near the feed wire except that he believed and relied upon appellant to properly insulate the guy wire so that a circuit could not be formed with the feed wire; that appellant knew of the presence of the feed wire and the imminent danger to decedent unless he was fully protected and insulated, but it negligently failed to insulate and protect him; that by reason of appellant's negligence, a circuit was formed when the uninsulated end of the guy wire came in contact with the ground at the time decedent's body came in contact with the feed wire, and the decedent at that time having hold of the guy wire with his hands, in the line of his duty, was instantly killed.

If the complaint in this case contains a general charge of negligence against the master, as a result of which negligence, appellee's decedent received the injury which

1. resulted in his death, the complaint will withstand a demurrer (*Lake Erie, etc., R. Co. v. Moore* [1908], 42 Ind. App. 32, 81 N. E. 85, 84 N. E. 506; *Indianapolis, etc., Traction Co. v. Newby* [1910], 45 Ind. App. 540, 90 N. E. 29, 91 N. E. 36; *Princeton Coal, etc., Co. v. Roll* [1904], 162 Ind. 115, 66 N. E. 169), and mere recitals and conclusions of the pleader with respect to particular acts will be treated as surplusage. *Ochs v. M. J. Carnahan Co.* (1908), 42 Ind. App. 157, 76 N. E. 788, 80 N. E. 163; *Hamilton Nat. Bank v. Nye* (1906), 37 Ind. App. 464, 77 N. E. 295; *Ralya v. Atkins & Co.* (1901), 157 Ind. 331, 61 N. E. 726; *City of New Albany v. Armstrong* (1899), 22 Ind. App. 15, 53 N. E. 185; *Reed v. Tioga Mfg. Co.* (1879), 66 Ind. 21; *Harding v. Third Presbyterian Church* (1863), 20 Ind. 71; *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99. The complaint in this case very specifically charges that appellee's decedent, in the service
2. of appellant, and in obedience to the order of the foreman under whom he was working, was at work

in a place of great and imminent danger, to wit, at the top of a light pole on which there were strung wires carrying heavy currents of electricity, which, if a circuit was formed, would cause instant death to him or any other person coming in contact therewith; that it was the duty of the master to properly insulate decedent while engaged in such dangerous and hazardous employment, and otherwise provide for his safety while so engaged; that appellant knew at the time in question, of decedent's great and imminent danger unless he was fully protected and insulated, but notwithstanding such knowledge, it negligently failed to insulate and protect him, and by reason thereof, a circuit was formed between the feed wire on the pole upon which he was at work, and the guy wire with which he was at work, and that decedent received the full voltage of electricity through his body, causing his instant death. Appellant ably argues

that the allegation in the complaint that "it was

3. necessary for said deceased to be in close proximity to said feed wire", is pleading a conclusion. The allegations of the complaint disclose that appellee's

2. decedent was ordered to do the work in question. It is also alleged that "said pole at that time carried a feed wire that was so heavily charged with electricity that to come in contact with the same so as to form a circuit would destroy human life; that the presence of said feed wire and its effect upon human life was known to the defendant." It is the opinion of the court that this allegation is sufficiently clear to enable the court to understand that a man who was obliged in the performance of his duty to fasten the guy wire to the cross arm, as stated in the complaint, was obliged to be near the feed wire attached thereto. The demurrer to the fourth paragraph of complaint was properly overruled.

The first reason assigned in support of the motion for a new trial is the error of the court in permitting appellee's counsel, over appellant's objection, in the examination of

the jurors as to their qualifications to serve as such, 4. to ask each juror if he was either a stockholder, officer, employe or agent of the Frankfort Marine and Accident Insurance Company "which has issued a policy to the defendant, The Evansville Gas and Electric Light Company, indemnifying it against any loss or damage that it may have to pay by reason of injury to its employes." As preliminary to the question, counsel for appellee offered to prove that the company named had issued a policy of the kind, and was in court defending by its hired counsel. The court did not require the proof, but permitted appellee's counsel to interrogate the jurors. Appellee cites as authority for the correctness of the trial court's ruling on this question, the cases of *M. O'Connor & Co. v. Gillaspy* (1908), 170 Ind. 428, 83 N. E. 738; *Goff v. Kokomo Brass Works* (1909), 43 Ind. App. 642, 88 N. E. 312. An examination of these cases discloses that the question directed to the jurors covered only one point, namely, as to whether they were interested in an insurance company. In the case at bar, the question goes beyond the scope of the questions in the cases cited. This court expressly disapproves the method of examination of the jurors in the case being considered, as above set out, and had the question been properly presented here, it might be cause for a reversal. However, we are of the opinion that appellant can not submit his cause to a jury, and upon an adverse verdict and judgment have the relief he seeks in this court. Appellant should have objected to the submission of the cause to the jury, moved to set aside the submission, and saved exceptions to the ruling of the court thereon in order to properly present this question.

Appellant insists that the court erred in giving to the jury instructions Nos. 1, 4, 5 and 14 requested by appellee, and in refusing to give instructions Nos. 3, 7, 11, 12, 13, 14, 16, 17 and 18 tendered by appellant.

It is insisted by appellee that appellant has not set out

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in its brief the exact page and line of the record where all of the instructions may be found, and that this error

5. is in violation of the rules of this court. This may be said to be a technical violation of the rule, but inasmuch as both counsel for appellant and appellee have filed helpful briefs, with much argument and citation of authorities, the court will pass upon the points urged against the instructions.

In instruction No. 1 objected to by appellant, the court set out the complaint in full, on the theory that it was giving the jury the material allegations thereof. It is com-

6. plained that the court, in giving an instruction of this character, should have embraced all of the elements and conditions essential to a verdict. It is

7. stated that the court omitted reference to contributory negligence, and the question of assumption of risk. The court also, evidently inadvertently, said that the jury should find for appellee, if the evidence preponderated in her favor, not only in respect to the material allegations of the fourth paragraph of the complaint, but if the evidence preponderated in her favor as to any of the paragraphs of complaint. Three of the paragraphs of the complaint had been dismissed by appellee at the close of the evidence. While the practice of copying a complaint, including the caption and signature of counsel, in an instruction to the jury, should not be encouraged, we are not able to say that appellant was harmed thereby in this case. The other objections urged against this instruction, set out above, are fully covered by other instructions in this case. It

8. has been repeatedly decided by this court, as well as by the Supreme Court, that the instructions must be taken as a whole, and that particular instructions or parts of instructions shall not be taken out from the whole body thereof, and subjected to criticism. *Sterling v. Frick* (1909), 171 Ind. 710, 86 N. E. 65, 87 N. E. 237; *Eacock v. State* (1907), 169 Ind. 488, 82 N. E. 1039; *Indianapolis Trac-*

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tion, etc., Co. v. Formes (1907), 40 Ind. App. 202, 80 N. E. 872; *Southern Ind. R. Co. v. Baker* (1906), 37 Ind. App. 405, 77 N. E. 64.

Objections to instructions Nos. 4, 5 and 14 given at the request of appellee are also made. It is stated that in No.

4, the court usurped the rights of the jury in saying
9. directly what it was or was not the duty of decedent Robertson to do. We see no error in this instruction which could have rendered it harmful. Instruction No. 5 is objected to on the ground that it stated to the jury what acts of Robertson would constitute contributory negligence. The instruction directs the jury that unless Robertson was guilty of some negligent act in touching the charged wire, he could not be held to be guilty of contributory negligence. We think this is not erroneous.

Instruction No. 14 is criticised because it states "a servant does not assume risks flowing from his employer's negligence in these duties." (The duties referred to
10. were set out.) We think this is not an erroneous statement of the law taken in connection with the full context of the instruction, together with the other instructions given in the case. *Newcastle Bridge Co. v. Doty* (1907), 168 Ind. 259, 79 N. E. 485.

Instructions Nos. 3, 7, 11, 12, 13, 14, 16, 17 and 18 tendered by appellant were refused by the court. As this court views the instructions, they were rightly refused,
11. for the reason that the court covered every legal proposition correctly stated in these instructions in some one of the others given.

Appellant also argues that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. The whole argument of appellant rests upon the theory that the men who were, under the direction of the foreman, engaged in the work of holding the uninsulated guy wire from the ground, so as to protect the men who were upon the pole, including appellee's decedent, were engaged in the

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same line of work as appellee's decedent, and that they were therefore fellow servants. Therefore the injury was caused by the negligence of a fellow servant. If this is a correct application of the fellow servant rule, appellant's contention must be sustained.

The work of decedent required him to be upon the pole. It was the duty of appellant to use care commensurate with the danger toward keeping the place safe. The place became unsafe not because of the presence of the feed wire, and decedent's contact with it, but because the uninsulated guy wire came in contact with the ground. If the uninsulated guy wire had not been suffered to come in contact with the ground, Robertson could have remained in contact with the feed wire indefinitely without injury. It was appellant's duty to prevent contact of the guy wire with the ground. Robertson, while engaged in his work, had a right to rely upon the performance of this duty. When appellant sent decedent to fasten the guy wire as charged, it was its legal duty to know, and it did know that the working place could not be a safe one, if, by its negligence, a deadly current might be sent through decedent's body. The perilous situation of the servant demanded care on the part of the master. When he sends his servant into a working place that he knows may become unsafe in the absence of necessary precautions on the part of the master, and which he knows will be safe if such precautions are used, the master can not escape liability when such precautions are omitted. While engaged in the maintenance of highly charged electrical wires on poles that its employes must ascend in the discharge of their duties, it is bound to know the natural and ordinary hazards of the work at such places, and such knowledge the law imputes to it. In view of this knowledge, it is the duty of such master to use care commensurate to the danger to eliminate such hazards while its employe, with its knowledge, is engaged in its work. The duty of the master in respect to the maintenance of a safe

working place for its servants, especially when the
13. work is among elements and appliances which are dangerous only in the absence of care on its part, imposes on the master the obligation to employ active vigilance and care. We think this duty can not be escaped on the theory that the master did not know that the servant would encounter the danger at the moment of its negligence.

In this case, the working place of decedent became highly dangerous only in the event of the grounding of the uninsulated guy wire, thus forming a circuit, the current
14. of which became deadly to decedent or any other person who came in contact with it. In view of the legal rule which required appellant to use care commensurate with the danger to keep the working place safe, it was the duty of appellant to use such care to prevent the contact of the uninsulated guy wire with the ground, and this duty could not be delegated so as to allow the master to escape liability. *Brazil Block Coal Co. v. Young* (1889), 117 Ind. 520, 20 N. E. 423; *Republic Iron, etc., Co. v. Ohler* (1903), 161 Ind. 393, 68 N. E. 901; *Indiana Car Co. v. Parker* (1885), 100 Ind. 181; *Lake Erie, etc., R. Co. v. Ford* (1906), 167 Ind. 205, 78 N. E. 696; 1 Thompson, Negligence §796; *Snyder v. Wheeling Electric Co.* (1897), 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. 922; *Newark Electric, etc., Co. v. Garden* (1896), 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; *Overall v. Louisville Elec. Light Co.* (1898), 47 S. W. (Ky.) 442; *Denver Con. Electric Co. v. Simpson* (1895), 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Geissman v. Missouri, etc., Electric Co.* (1903), 173 Mo. 654, 73 S. W. 654; *Nagle v. Hake* (1904), 123 Wis. 256, 101 N. W. 409; *Herbert v. Lake Charles Ice, etc., Co.* (1903), 111 La. 522, 35 South. 731, 100 Am. St. 505, 64 L. R. A. 101; *Wilbert v. Sheboygan Light, etc., Co.* (1906), 129 Wis. 1, 106 N. W. 1058, 116 Am. St. 931; *Perham v. Portland Elec. Co.* (1898), 33 Or. 451, 53 Pac. 14, 72 Am. St. 730, 40 L. R. A. 799.

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This court will not disturb the verdict of the jury on the ground that it is not sustained by the evidence, if 15. there is any evidence to sustain the verdict. *Delaware, etc., Tel. Co. v. Fiske* (1907), 40 Ind. App. 348, 81 N. E. 1110.

The verdict is not contrary to law. Judgment affirmed.

NOTE.—Reported in 100 N. E. 689. As to assumption of risk and contributory negligence in law of master and servant, see 97 Am. St. 884, 98 Am. St. 289. As to duty and liability of electric corporations, see 100 Am. St. 515. As to whether a servant may assume the risk of dangers created by the master's negligence see 4 L. R. A. (N. S.) 848; 28 L. R. A. (N. S.) 1215. On the nondelegability of master's duty of selecting appliances, etc., for linemen, see 30 L. R. A. (N. S.) 49. As to liability of electric company to employe for injury caused by electric shock, see 32 L. R. A. 351. As to the right of a jury to consider the fact that an employer is insured against accidents to employees, see 3 Ann. Cas. 554; 9 Ann. Cas. 323; Ann. Cas. 1913 C 359. See, also, under (1) 26 Cyc. 1386; (2) 26 Cyc. 1389, 1390; (4) 24 Cyc. 320; (5) 2 Cyc. 1014; (6) 38 Cyc. 1610; (7) 38 Cyc. 1781; (8) 38 Cyc. 1778; (10) 38 Cyc. 1779; (11) 38 Cyc. 1711; (12) 26 Cyc. 1120; (13) 26 Cyc. 1097; (14) 26 Cyc. 1104; (15) 3 Cyc. 348.

SULLENGER v. BAECHER.

[No. 7,842. Filed April 16, 1913. Rehearing denied June 28, 1913. Transfer denied January 14, 1914.]

1. **TAXATION.**—*Tax Deeds.*—*Validity.*—*Defective Description.*—A tax deed to land forming a part of survey No. 17, containing 200 acres, based on descriptions in the various tax records as part of lot 17, township 1, range 10, 100 acres, was wholly ineffective to convey title, since the description was insufficient to identify the land sought to be conveyed. p. 367.
2. **TAXATION.**—*Records.*—*Description.*—*Sufficiency.*—It is the policy of the law to preserve and enforce the lien of taxes, and courts will sustain descriptions in tax records to enforce such lien which would be insufficient to convey title by a tax deed based thereon. p. 368.
3. **TAXATION.**—*Tax Deeds.*—*Validity.*—*Presumptions.*—The presumption arising from the *prima facie* case made upon the question of title under §10380 Burns 1908, Acts 1891 p. 199, §200, providing that a tax deed shall be *prima facie* evidence of the

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regularity of the sale and all prior proceedings, as well as *prima facie* evidence of the premises described in the deed, and of a good and valid title in fee simple in the grantee of such deed, is subject to be rebutted by evidence showing the description to be so defective as to render the deed ineffectual to convey title. p. 369.

4. APPEAL.—*Weighing Evidence.—Records.*—It is the province of the court on appeal to declare what force and effect shall be given to evidence consisting entirely of records. p. 369.
5. DEEDS.—*Title of Vendor.—Bona Fide Purchaser.—Statutes.*—The grantee in a quitclaim deed from one who had been divested of his rights and interest by sale in bankruptcy proceedings took no title unless he was at the time a good faith purchaser for a valuable consideration within the meaning of §3962 Burns 1908, §2931 R. S. 1881. p. 370.
6. VENDOR AND PURCHASER.—*Evidence as to Purchase in Good Faith.—Burden of Proof.*—The grantee in a quitclaim deed from one who had been divested of his rights and interest, if he relies on such deed to establish title in himself, has the burden of proving that he was a purchaser in good faith and for a valuable consideration, without notice either actual or constructive of the rights of the person to whom the title of his grantor had previously passed. p. 370.
7. DEEDS.—*Quitclaim Deed.—Effect.*—Except in so far as the grantee in a quitclaim deed may be protected by the recording act, the effect of such a deed is limited to the estate or interest held by the grantor at the time of its execution. p. 371.
8. VENDOR AND PURCHASER.—*Bona Fide Purchaser.—Purchaser Under Quitclaim Deed.*—The grantee in a quitclaim deed may be entitled to the protection afforded a *bona fide* purchaser on establishing by proof that the purchase was in good faith and that the consideration paid was a fair price. p. 371.
9. VENDOR AND PURCHASER.—*Bona Fide Purchaser.—Evidence.—Sufficiency.*—Where one seeking to establish title in himself by virtue of a quitclaim deed from a grantor who had been divested of all right and interest in the land conveyed failed to prove that the consideration paid was a fair or reasonable price for the land, the evidence failed to show that he was a *bona fide* purchaser for value and was insufficient to sustain a verdict on the theory that he acquired title by such deed. p. 372.

From Knox Circuit Court; *William H. Hill*, Special Judge.

Action by Englebert A. Baecher against Mary Sullenger. From a judgment for plaintiff, the defendant appeals. *Reversed.*

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B. M. Willoughby and James M. House, for appellant.

Samuel W. Williams and Robert G. Cauthorn, for appellee.

LAIRY, J.—Appellee recovered a judgment in the Knox Circuit Court quieting his title as against appellant to a certain tract of land in Knox County, Indiana. The only error assigned on appeal is the action of the trial court in overruling appellant's motion for a new trial.

For some time prior to the year 1904, Henry L. Wheatley was the owner of the real estate in controversy and was in possession of the same. On February 11, 1907, appellee purchased the land at a sale for taxes assessed against Henry L. Wheatley for the year 1906 and previous years, and received a certificate therefor. On February 12, 1909, the auditor of Knox County, upon presentation of this certificate, executed and delivered to appellee a tax deed, upon which appellee bases his claim of title to the land involved in this suit. At the time this action was brought, appellant was in possession of the land, claiming title thereto as heir of her father, Henry C. Mooney and by virtue of an unrecorded deed executed to him by the trustee in the bankruptcy proceeding of Henry L. Wheatley.

The first specification of appellant's motion for a new trial challenges the sufficiency of the evidence to sustain the verdict. Appellant's contention is that the tax deed

1. upon which appellee relies is not sufficient to convey title for the reason that the description contained in the records made for taxation purposes is so uncertain, indefinite and imperfect that no valid deed could be based thereon. It appears from the evidence that survey No. 17, of which the land in controversy formed a part, contained about 200 acres of land. The land which appellee purchased at the tax sale is described in the entry for taxation on the tax duplicate of Knox County as follows: "Henry L. Wheatley Part Lot 17, Township 1, Range 10, 100 acres." The description in the notice of tax sale is in the words and

figures following: "Henry L. Wheatley pt. lot 17, tp. 1, range 10, 100 acres." In the delinquent list returned by the auditor the description is: "Pt. lot 17, Township 1, Range 10, acres 100. Johnson Township, Knox County, Indiana." In the tax sale record the land is described as follows: "All Survey 17 Township 1, Range 10, 100 acres, Johnson Township." and in the tax certificate upon which the deed purports to be issued the description reads: "Part of Sur. 17, Town one Range Ten containing 100 acres in Johnson Township, Knox County, Indiana." It is apparent we think that none of these descriptions were sufficient to indicate what part of survey 17 was covered by the description. No surveyor from this description alone would be able to locate and identify the particular tract intended, for the reason that 100 acres of land laid off any place within the survey would meet and comply with all of the terms of the description. Under the decisions of the courts of this State, the deed based upon these descriptions was wholly ineffective to convey title. *Cooper v. Jackson* (1880), 71 Ind. 244; *Ball v. Barnes* (1890), 123 Ind. 394, 24 N. E. 142; *Armstrong v. Hufty* (1901), 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080; *Brown v. Reeves & Co.* (1903), 31 Ind. App. 517, 68 N. E. 604; *Green v. McGrew* (1905), 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832, 111 Am. St. 149; *Reed v. Earhart* (1882), 88 Ind. 159; *Ford v. Kolb* (1882), 84 Ind. 198.

It is the policy of the law to preserve and enforce the lien of taxes, and, with that end in view, courts have frequently sustained descriptions in tax records for the

2. purpose of enforcing the lien, which, under the decisions of the same courts, would be clearly insufficient to convey title by a tax deed based thereon. *State, ex rel. v. Casteel* (1887), 110 Ind. 174, 11 N. E. 219; *Peckham v. Millikan* (1885), 99 Ind. 352; *Sloan v. Sewell* (1881), 81 Ind. 180.

Appellee relies upon §10380 Burns 1908, Acts 1891 p.

199, §206, which contains the following provision: “Such deed shall be *prima facie* evidence of the regularity

3. of the sale of the premises described in the deed, and of the regularity of all prior proceedings, and *prima facie* evidence of a good and valid title in fee-simple in the grantee of said deed.” He correctly asserts that by force of this statute, the introduction of the tax deed in evidence was sufficient to make a *prima facie* case in his favor upon the question of title. This may be conceded but the presumption arising from the *prima facie* case so made is subject to be rebutted by evidence, and in this case it is so rebutted by evidence showing that the description of the land in the tax records upon which the deed is based is so defective as to render the deed ineffectual to convey title. This conclusion is not reached as a result of weighing conflicting parol evidence. The evidence which rebuts

4. the *prima facie* case consists entirely of records, and it is the province of the court to declare what force and effect shall be given to evidence of this character. *Sallee v. Soules* (1907), 168 Ind. 624, 81 N. E. 587; *State, ex rel. v. Board, etc.* (1905), 165 Ind. 262, 74 N. E. 1091.

Other questions presented by this appeal are not considered for the reason that they will not probably arise upon another trial. The judgment is reversed with directions to grant a new trial.

ON PETITION FOR REHEARING.

LAIRY, J.—Appellee recovered a judgment against appellant quieting his title to certain lands. The original opinion holds that the verdict is not sustained by the evidence. To sustain his complaint, appellee traced the title from the government to a man named Henry L. Wheatley. He then introduced a tax deed for the land in question from the auditor of Knox County to himself, based upon a tax sale of the land as the property of Henry L. Wheatley. He also

introduced a quitclaim deed from said Wheatley to himself for the same land. The original opinion holds that the tax deed was ineffective to convey title and we are still content with this holding. Upon petition for rehearing, appellee calls our attention to the fact that we did not in the original opinion discuss the effect of the quitclaim deed; and it is earnestly contended that this deed constitutes some evidence of title sufficient to sustain the verdict of the jury. This question was not seriously pressed upon the consideration of the court by the original briefs and for this reason it was not discussed in the opinion; but it was referred to in the briefs of appellee and was sufficiently presented to save the question from being waived.

The quitclaim deed by which Henry L. Wheatley released and quitclaimed to appellee all his right, title and interest in and to the land in question, bears date of May 18, 5. 1909. The evidence shows without dispute that on May 25, 1904, long prior to the execution of this deed, Henry L. Wheatley had been divested of all his title and interest in this land by a sale thereof in bankruptcy proceedings. Our attention is called to some minor defects and irregularities in the proceedings leading up to the execution of the deed of the trustee in the bankruptcy proceedings, but it is not contended that they are of such a character as to render the deed void. The sale was confirmed by the bankruptcy court and the deed was sufficient to divest the title formerly held by Wheatley, the bankrupt. This being true, he had no title to convey at the time he made the quitclaim deed to appellee, and no title passed by this deed unless appellee was at the time a good faith purchaser for a valuable consideration within the meaning of the recording act of this State. §3962 Burns 1908, §2931 R. S. 1881.

The burden rested upon appellee, as the plaintiff below, to establish his title; and if he relied for that pur-

6. pose on a deed from a former owner, executed after such owner had parted with the title, it was incumbent

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on him to prove that he was a purchaser in good faith and for a valuable consideration. This would require him to offer evidence to prove that at the time he received the conveyance, he had no notice, either actual or constructive, of the rights of the person to whom the title of his grantor had previously passed. The deed executed by Wheatley to appellee on May 18, 1909, was a mere quitclaim deed. Ex-

cept in so far as the grantee may be protected by

7. the recording act, the effect of such a deed is limited to the estate or interest held by the grantor at the time of its execution. *Bryan v. Uland* (1885), 101 Ind. 477; *Stephenson v. Boody* (1894), 139 Ind. 60, 38 N. E. 331.

Is the grantee in a quitclaim deed protected by the recording act against prior unrecorded conveyances or incumbrances or other equities affecting the title of his grantor?

Some cases have gone to the extent of holding that the

8. character of the deed is of itself enough to warn the grantee that he is getting a doubtful title, and that such grantee is conclusively presumed not to be a purchaser in good faith such as will be protected by the registry laws. *Snow v. Lake's Admr.* (1884), 20 Fla. 656, 51 Am. Rep. 625; *Beakley v. Robert* (1899), 120 Mich. 209, 79 N. W. 193; *Smith's Heirs v. Branch Bank, etc.* (1852), 21 Ala. 125; *Steele v. Sioux Valley Bank* (1890), 79 Iowa 339, 44 N. W. 564, 18 Am. St. 370, 7 L. R. A. 524. Other cases announce the doctrine that a grantee in a quitclaim deed is not precluded by the form of the instrument of conveyance from proving that he is a *bona fide* purchaser for value, and that if it is established by evidence that the grantee took the deed with no knowledge of any outstanding conveyance or obligations respecting the property and without notice of any fact which, if followed up, would lead to such knowledge, he is entitled to the protection of a *bona fide* purchaser, upon further proof that the consideration stipulated has been paid and that such consideration was a fair price for the land or the interest designated as conveyed. *Meikel v. Bor-*

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ders (1891), 129 Ind. 529, 29 N. E. 29; *Moelle v. Sherwood* (1893), 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350; *Babcock v. Wells* (1903), 25 R. I. 23, 54 Atl. 596, 105 Am. St. 848, and note thereto.

We think that the doctrine last announced is more consonant with reason and that it is supported by the weight of authority. The Supreme Court of this State has held that the grantee in a quitclaim deed may be entitled to the protection afforded a *bona fide* purchaser. *Smith v. McClain* (1896), 146 Ind. 77, 45 N. E. 41. In the opinion in this case, the court at page 84 says: "While there is some conflict in the authorities upon this question, we think that the correct doctrine under the recording acts is that, one may become a *bona fide* purchaser under a quitclaim deed, the same as under any other form of conveyance."

The fact alone that appellee accepted a quitclaim deed does not, in our opinion, conclusively show that he was not a good faith purchaser for value and he was not thereby precluded from showing, if he could, that the consideration named in the deed and actually paid was the fair cash value of the land conveyed, and that at the time the deed was executed, he had no knowledge of any unrecorded deed or other outstanding equities affecting the title. The burden was upon appellee to establish such facts if he sought to bring himself within the protection of the recording statute providing that prior unrecorded conveyances shall be void as against any subsequent purchaser in good faith and for a valuable consideration. §3962 Burns 1908, §2931 R. S. 1881.

The consideration which was named in the deed and which was actually paid as shown by the undisputed evidence was

\$10. There is no evidence in the record tending to

9. prove that this was a fair or reasonable price for the land or the interest therein designated. The evidence, therefore, fails to show that appellee was a good faith purchaser for value under the quitclaim deed introduced in the evidence; and, if the verdict in favor of appellee is based

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upon the theory that he acquired title to the land in controversy under and by virtue of this deed, the evidence fails to sustain it upon that theory.

We have examined the other questions presented by the petition for rehearing and we find no reason to change our views as expressed in the original opinion.

Petition overruled.

NOTE.—Reported in 100 N. E. 517; 102 N. E. 380. As to effect of quitclaim deed, see 105 Am. St. 854. As to whether holder under quitclaim is *bona fide* purchaser, see 1 Am. St. 247. As to the effect of a quitclaim deed on after-acquired title, see 35 L. R. A. (N. S.) 1182. As to what interests and rights of the grantor pass by a quitclaim deed, see Ann. Cas. 1913 C 363. See, also, under (1) 37 Cyc. 1445; (2) 37 Cyc. 1052; (3) 37 Cyc. 1465; (4) 3 Cyc. 377; (5) 39 Cyc. 1696; (6) 39 Cyc. 1780; (7) 13 Cyc. 653; (8) 39 Cyc. 1693; (9) 39 Cyc. 1784.

NELSON v. CHICAGO, LAKE SHORE AND SOUTH BEND RAILWAY COMPANY.

[No. 8,212. Filed January 14, 1914.]

1. NEGLIGENCE.—*Contributory Negligence.—Burden of Proof.—Instructions.*—Under §362 Burns 1908, Acts 1899 p. 58, the defendant in a personal injury case has the burden of proving contributory negligence by a preponderance of the evidence, and if the evidence on that issue is evenly balanced the finding thereon should be for plaintiff; hence an instruction that “the failure of the evidence to show by a fair preponderance that the plaintiff was free from contributory negligence would absolve the defendant from liability even though guilty of negligence” was erroneous. p. 374.
2. APPEAL.—*Review.—Harmless Error.—Instructions.*—Error in instructions as to the question of contributory negligence, and as to the duty of a pedestrian crossing a street railway track, was harmless, where the jury’s answers to interrogatories negatived every charge of negligence contained in the complaint. p. 374.

From Laporte Superior Court; *Harry B. Tuthill*, Judge.

Action by Seth Nelson against the Chicago, Lake Shore and South Bend Railway Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Nelson v. Chicago, etc., R. Co.—55 Ind. App. 373.

Marvin E. Barnhart and *L. L. Bomberger*, for appellant.
F. J. Lewis Meyer, for appellee.

IBACH, J.—This was an action for damages for personal injuries received when appellant was struck by appellee's interurban car while he was walking across a street in the city of East Chicago, Indiana. Upon a former appeal, a judgment for appellee was reversed because the court had instructed the jury to return a verdict for appellee upon the ground that appellant was, as a matter of law, guilty of contributory negligence. This decision is reported as *Nelson v. Chicago, etc., R. Co.* (1908), 41 Ind. App. 397, 83 N. E. 1019. Upon the present appeal it is urged as error only that certain instructions to the jury relating to contributory negligence were erroneous.

By instruction No. 6 the jury was told, "the failure of the evidence to show by a fair preponderance that the plaintiff was free from contributory negligence would absolve the defendant from liability even though guilty of negligence." This is an incorrect statement of the law.

Our statute places the burden of proving contributory negligence upon the defendant in personal injury cases. §362 Burns 1908, Acts 1899 p. 58. In order to defeat a plaintiff's recovery in a personal injury suit upon the ground of his contributory negligence, it must affirmatively appear from a preponderance of the evidence that he was guilty of such negligence, and if the evidence on such issue is evenly balanced, the jury should find the plaintiff free from fault. Instruction No. 2 contained some inaccurate statements as to the duty of a pedestrian crossing a street railway track. The court erred in giving instructions Nos.

2 and 6. However, the error in giving these instructions was harmless for the reason that the jury found in answer to interrogatories facts which specifically negative each and every charge of negligence contained in the complaint. Though the erroneous instructions upon contributory negligence may have influenced the jury's find-

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ings upon facts relating to that issue, these instructions cannot be conceived to have affected the finding as to the facts relating to negligence on the part of appellee. As said in the case of *Ziehm v. Pittsburgh, etc., R. Co.* (1909), 44 Ind. App. 93, 88 N. E. 707, "It thus affirmatively appears from the answers to the interrogatories that the facts upon which appellant bases his right of action did not exist, and whatever errors may have intervened in the trial of the case could furnish no ground for reversal."

Judgment affirmed.

NOTE.—Reported in 103 N. E. 857. On the question of burden of proof as to contributory negligence, see 33 L. R. A. (N. S.) 1085; 10 Ann. Cas. 4. See, also, under (1) 29 Cyc. 597, 644; (2) 38 Cyc. 1815.

PABST BREWING COMPANY v. SCHUSTER ET AL.

[No. 8,105. Filed January 15, 1914.]

1. HUSBAND AND WIFE.—*Mortgages.—Suretyship of Wife.—Estoppel to Deny Liability.*—The fact that a married woman, on executing a note and mortgage for a loan, made an affidavit stating that "said loan and the proceeds thereof" were "paid to her by check and draft payable to her order", that part of the money was to be used to pay off a mortgage on her real estate and that the balance was for her own separate use in the betterment of her own property, did not estop her under the provisions of §7856 Burns 1908, Acts 1903 p. 394, relating to loans to married women, from proving that part of the money was not received by her, but was paid by the lender to the holder of a prior mortgage on the same property to secure a loan to her husband, and in view of uncontradicted evidence sustaining that proposition, she was entitled to the protection afforded by §7855 Burns 1908, §5119 R. S. 1881, declaring that contracts of suretyship by a married woman are void as to her. (*Ludlow v. Colt* [1908], 41 Ind. App. 138, distinguished.) pp. 379, 380.
2. STATUTES.—*Construction.*—A clear and unambiguous statute must be held to mean what it plainly says. p. 379.
3. ACTIONS.—*Statutory Remedies.*—In order to obtain the protection and benefit of a statute, one must bring himself clearly within its provisions. p. 380.

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4. **ESTOPPEL.—Elements.**—One relying upon the act or declaration of another as an estoppel must show that he acted upon the same and was influenced thereby in a way that would result in injury if the other person is permitted to gainsay or deny the truth of what he did, and it is essential to estoppel that the person relying thereon must have been misled or deceived by such act or declaration. p. 381.
5. **HUSBAND AND WIFE.—Mortgages.—Suretyship of Wife.—Estoppel to Deny Liability.**—While a married woman is subject to estoppel *in pais*, some element of fraud must enter into her conduct so that the estoppel shall be predicated upon tort, and not upon contract; hence where a married woman, on executing a note and mortgage, made an affidavit disclosing that a part of the money obtained was to discharge a prior mortgage but not indicating whose debt the prior mortgage was given to secure, and the lender itself paid to the holder the amount due on such prior mortgage, there was, notwithstanding a further recital in the affidavit that the money was paid to her "by check and draft payable to her order", no fraud, misrepresentation or concealment affecting the lender's action so as to work an estoppel *in pais* preventing her from denying liability on the ground that she did not receive the money, but that it was applied to the discharge of her husband's debt. pp. 381, 383.
6. **HUSBAND AND WIFE.—Mortgages.—Suretyship of Wife.—Admission of Evidence.**—In an action on the note of a married woman and to foreclose a mortgage securing same, where a part of the proceeds of the note went to the payment of a prior mortgage, evidence was admissible to show that such prior mortgage was given to secure an advance of money to her husband to purchase goods, and that plaintiff knew that she never received any benefit therefrom. p. 383.

From Lake Superior Court; *C. B. Tinkham*, Special Judge.

Action by the Pabst Brewing Company against Anna Schuster and others. From the judgment rendered, the plaintiff appeals. *Affirmed.*

Bomberger, Sawyer & Curtis, for appellant.

Hembroff & Glazebrook and *John H. Gillett*, for appellees.

HOTTEL, J.—Appellant sought by this action to recover on a certain promissory note for \$1,000 executed to it by the appellees, Annie and George Schuster and to foreclose a mortgage executed by the same parties to secure their note.

The errors relied on in this court require us to indicate the issues of fact alone. They were tendered by the following pleadings, the substance of which we indicate so far as necessary to an understanding of the questions presented by the appeal, viz., A complaint in ordinary form of foreclosure, except that it alleges that appellee Annie Schuster was the owner of the real estate mortgaged and that the money was loaned to her and used for the improvement of the real estate; answers of general denial by the appellees, and a second paragraph of affirmative answer by appellee Annie Schuster setting up that she was a married woman and the sole owner of the property mentioned in plaintiff's complaint, that she executed the note and mortgage as surety for her coappellee who was her husband, and that he received the entire consideration therefor; a reply to such special answer setting out that at the time the note and mortgage were executed, appellee Annie Schuster also executed an affidavit to the effect that said loan was to be used for her own separate use as provided by §7856 Burns 1908, Acts 1903 p. 394. The cause was submitted to the court for trial, resulting in a general finding and judgment in favor of appellant, that there was then due on the note and mortgage in question the sum of \$695 plus \$103.70 interest and \$49.75 attorney's fees and that said mortgage be foreclosed, etc.

Appellant filed a motion for a new trial which motion was overruled. This ruling is assigned as error and relied on for reversal. It will be observed that, by its judgment, the trial court reduced the principal of the note sued on to \$695. This was due to the fact, as conceded by appellant in its brief, that \$305 of the amount represented by the principal of the note in suit "was paid not directly to appellee Annie Schuster but at her direction to the holder of a prior mortgage on the same property as that covered by the mortgage in the case at bar". The first three grounds of appellant's motion for new trial are: (1) the court

erred in assessing the amount of plaintiff's recovery herein, said assessment being too small, said action being upon contract; (2) the decision of the court is not sustained by sufficient evidence; (3) the decision of the court is contrary to law. The other grounds for new trial relate to the admission of evidence. Practically the same question is presented in different form by the grounds of the motion indicated, and as affecting such question the following statutory provisions are important: "All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." §7851 Burns 1908, §5115 R. S. 1881. "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." §7855 Burns 1908, §5119 R. S. 1881. "That any married woman who shall hereafter execute her promissory note, * * * and deliver the same to any person, firm or corporation for the purpose of securing a loan, and such * * * corporation shall make such loan and *shall pay the proceeds thereof to such married woman in cash, or by check or draft drawn payable to her order*, and such married woman shall state under oath in writing the purpose for which such borrowed money is to be used, and if such affidavit shall show the same to be for her own separate use or the betterment of her property, * * * *she shall not be permitted thereafter to claim that such loan was made for the use or benefit of any person other than herself.*" (Our italics.) §7856 Burns 1908, Acts 1903 p. 394.

That part of the affidavit made by appellee Annie Schuster, under the section of statute last quoted, important as affecting the question involved is as follows: "And she further says that said loan and the proceeds thereof was paid to her by check and draft payable to her order; * * * that the purposes of (for) which said borrowed money is to be used is to pay off a mortgage on said above described real estate drawn in favor of one Theodore Oehne calling

for \$475 and interest and the balance of said money so borrowed from said Pabst Brewing Company is to be used for her own separate use in the betterment of her own property and is not to be used by her husband or any other person, nor for her said husband's or any other person's use or benefit, other than herself. * * * that she makes this affidavit for the purpose of obtaining said loan." The Theodore Oehne mentioned in this affidavit was shown by the evidence to have been at the time referred to, treasurer of the Seipp Brewing Company.

It is contended by appellant in effect that the appellee, Annie Schuster, by making said affidavit withdrew herself from the protection of §7855, *supra*, which provides

1. that her contracts of suretyship shall be void, and that she thereby precluded herself from afterwards setting up suretyship as a defense or from showing that the proceeds of the loan were not in fact paid to her "in cash, or by check or draft drawn payable to her order." In support of this contention, appellant relies on the case of *Ludlow v. Colt* (1908), 41 Ind. App. 138, 83 N. E. 643. There was a special finding of facts in that case in which the trial court specially found, among the other facts necessary and essential to bring the case within the provisions of the statute, *supra*, that the amount of the loan \$3,000 "*was paid by a check for \$3,000 made on said day by appellant upon a bank named and payable to the order of Carrie G. Colt*". (Our italics.) It follows that that case is easily distinguishable from the instant case. "Where

2. the language of a statute is clear and unambiguous it must be held to mean what it plainly expresses." *Cheney v. State, ex rel.* (1905), 165 Ind. 121, 125, 74 N. E. 892. See, also, 2 Lewis's Sutherland, Stat. Constr. (2d ed.)

§367. The language of the statute under consideration is clear and free from ambiguity. Said section provides in positive terms that the proceeds of the loan shall be paid to such married woman "in cash or by

check or draft drawn payable to her order.” *Union Nat. Bank v. Finley* (1913), 180 Ind. 470, 103 N. E. 110. It is not claimed in this case that said appellee received all the money represented by the principal of the note in suit, but, on the contrary, the uncontradicted evidence shows that \$305 out of the proceeds of said loan was paid by check payable to the order of “Conrad Seipp Brewing Company, Theo. Oehne, treasurer,” to secure a release of a mortgage against the property on which the loan in question was being made. In order to obtain the protection and

3. benefit of a statute, one must bring himself clearly within its terms and provisions. *Potter Mfg. Co. v. A. B. Meyer & Co.* (1909), 171 Ind. 513, 516, 86 N. E. 837, 131 Am. St. 267; *Town of Windfall City v. State* (1909), 172 Ind. 302, 306, 88 N. E. 505; *Fort Wayne Iron, etc., Co. v. Parsell* (1907), 168 Ind. 223, 79 N. E. 439; *Indianapolis, etc., Transit Co. v. Foreman* (1904), 162 Ind. 85, 96, 69 N. E. 669, 102 Am. St. 185; *Hamilton v. Jones* (1890), 125 Ind. 176, 178, 25 N. E. 192. It is manifest, therefore, that appellant is in no position to claim that said

1. appellee has estopped herself from asserting that the \$305 of said loan paid to the Seipp Brewing Company was never received by her. It will be observed that appellee Annie Schuster in her said affidavit states that “said loan and the proceeds thereof was paid to her by check and draft payable to her order” and appellant contends that said appellee is bound by this statement, and under the statute in question she cannot be heard to say to the contrary. The statute in question makes no provision for such a statement. On the contrary, the purpose of the statute contemplates and it provides by its express terms for a statement which is supposed to induce the loan and not a statement after the loan as to the manner of the payment of the money. The lender always has it within his power to protect himself in this respect, and in the payment of the loan may always bring himself within the

letter of the statute. The statute provides that such affidavit shall state "the purpose for which such borrowed money is to be used and if * * * for her own use or the betterment of her property or separate business she shall not be permitted thereafter *to claim that such loan was made for the use or benefit of any person other than herself.*" This provision is so clear and certain that it would seem to need no interpretation or construction placed on it. The words italicized indicate no attempt to prohibit or preclude such married woman from denying that she got the money on the loan which her affidavit was intended to procure, and to give to the statute such a meaning would be neither within its letter nor spirit.

Having disposed of the question so far as the statute is concerned, we next consider the contention of appellant that

appellee Annie Schuster is precluded by an estoppel

4. *in pais*, from denying liability on the note and mortgage. One who insists upon the acts of another as working an estoppel must show that he acted upon the same, and was influenced thereby to do some act which would result in an injury if that other is permitted to gainsay or deny the truth of what he did. That no man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by such act or declaration is fundamental. *Indianapolis Brewing Co. v. Behnke* (1908), 41 Ind. App. 288, 292, 81 N. E. 119; *Wright v. Fox* (1914), 56 Ind. App. —, 103 N. E. 442. It is contended by appellant that surety-

5. ship contracts of married women are voidable, and not void; that having failed to set up that defense as to the Seipp contract and mortgage, the payment by appellant at her direction of an amount to satisfy that obligation was supported by sufficient consideration, to wit, the release of a claim against her property, which she, by her failure to set up the defense of suretyship against it, had made valid, citing *Field v. Campbell* (1903), 67 N. E.

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1040. This case was taken over by the Supreme Court. See *Field v. Campbell* (1905), 164 Ind. 389, 72 N. E. 260, 108 Am. St. 301. In the latter case at page 401, the Supreme Court says: "While it is true that in some of our cases it has been stated that the suretyship obligation of a married woman is only voidable, yet such language has been used in pointing out the fact that under the terms of the statute the defense is of a personal nature. If the undertaking was of a character which the statute prohibited, it would not have such a status that her mere subsequent election to waive the defense could operate as a confirmation. See, *Voreis v. Nussbaum* (1892), 131 Ind. 267, [31 N. E. 70] 16 L. R. A. 45. It strikes us that to adopt the argument of counsel would be to attach importance to the shadow, rather than to the substance, which is the legislative enactment. Moreover, to hold that a married woman might execute a mortgage upon her property, purporting to render her liable as a guarantor to pay a debt previously incurred by another, and that she might then legally charge her estate by borrowing money to relieve her property of the mortgage, would be judicially to declare the open sesame which would swing wide the door to the nullification of the statute." In *Cupp v. Campbell* (1885), 103 Ind. 213, 220, 2 N. E. 565, the court says: "While it is true that a married woman is now subject to an estoppel *in pais*, like any other person, she is not to be estopped in any manner different from any other person. Some element of fraud, misrepresentation or concealment must enter into her conduct, so that the estoppel shall be predicated upon tort, and not upon contract. A married woman has no more right to injure or mislead others by her conduct or representations than if she were *sui juris*, and where it is made to appear that by fraud, misrepresentation or concealment, she has led one into contracting with her as principal, she will not be permitted to gainsay such representations as may have induced another to act who in good faith

relied on them.” (Our italics.) In the instant case, appellee’s affidavit shows that a part of the money was to discharge a prior mortgage. Appellant itself knowingly used a part of the money loaned for such purpose. There is nothing in the affidavit indicating whose debt the prior mortgage was given to secure and Mrs. Schuster’s statement therein that the proceeds were paid to her “by check and draft payable to her order” could not have induced the loan in the first instance, because such statement related to the payment, after the loan was induced and appellant knew as well as she did to whom such payment was made. Hence there is nothing to indicate any fraud, misrepresentation or concealment on which appellant acted.

There is evidence tending to show that the prior mortgage was given to secure an advance of money to her husband

to purchase a stock of goods for use in his

6. business and that she never received any part of the money, nor was her estate benefited in any way by it, and that appellant knew of this. Such evidence was properly received. *Fitzpatrick v. Papa* (1883), 89 Ind. 17, 20, 21; *Field v. Campbell, supra*, 393, 396, 400, 403. Appellant

clearly had knowledge that the \$305 was not

5. paid to Mrs. Schuster or to the benefit of her estate except to discharge the lien of the Seipp Brewing Company mortgage and appellee testified in effect that she did not authorize or direct such payment. Under such circumstances, we cannot say that appellant was misled by any statement made by appellee Annie Schuster, nor was she precluded from showing that she did not receive that part of the consideration for said loan represented by the check made payable to the order of the Seipp Brewing Company and that she did not authorize or direct such payment. *Davis v. Neighbors* (1905), 34 Ind. App. 441, 448, 449, 73 N. E. 151; *Field v. Campbell, supra*.

This conclusion disposes of the objections made to the evidence introduced affecting such question. The questions

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presented by other objections to the evidence are rendered moot by the finding and judgment in appellant's favor and hence need not be considered.

Judgment affirmed.

NOTE.—Reported in 103 N. E. 950. As to estoppel by conduct in general, see 38 Am. Dec. 631; 10 Am. St. 22. As to estoppel of married women, 28 Am. Rep. 374; 57 Am. St. 169. As to the suretyship of a wife under a mortgage of her separate property for her husband's debt, see 5 Ann. Cas. 643; Ann. Cas. 1912 D 108. See, also, under (1) 21 Cyc. 1462, 1487; (2) 36 Cyc. 1114; (3) 31 Cyc. 115; (4) 16 Cyc. 734, 744; (5) 21 Cyc. 1345, 1348; (6) 21 Cyc. 1570.

BURFORD v. DAUTRICH.

[No. 8,107. Filed January 15, 1914.]

1. NEGLIGENCE.—*Pleading.—Complaint.—Sufficiency.*—A complaint in a personal injury case charging a duty on the part of defendant to protect the plaintiff from the injury complained of, a failure to perform such duty, and an injury resulting therefrom, sufficiently states a cause of action. p. 387.
2. APPEAL.—*Review.—Sufficiency of Pleadings.*—The court on appeal is not warranted in reversing judgment on the ground that pleadings lack scientific accuracy, if they are substantially sufficient. p. 387.
3. APPEAL.—*Review.—Refusal of Instructions.*—The refusal of requested instructions is not erroneous, where, in so far as they are correct, they are fully covered by the instructions given. p. 387.
4. MASTER AND SERVANT.—*Injuries to Servant.—Trial.—Instructions.*—In a common-law action by a servant against his employer for damages for injuries caused by defendant's failure to furnish him a reasonably safe place in which to work, whereby he was injured by the falling of an elevator, an instruction that, as the elevator was a freight elevator, the defendant was not required to supply it with a safety device, was not pertinent to the issues and was properly refused. p. 387.
5. MASTER AND SERVANT.—*Injuries to Servant.—Trial.—Instructions.—Assumption of Risk.*—In a servant's action against his master for damages on account of personal injuries, an instruction that the plaintiff must establish by a fair preponderance of the evidence that the defendant committed the acts of negligence

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charged, or some of them, which approximately caused the injuries complained of, or some of them, and if plaintiff established those things he could recover, unless it was also shown that he was guilty of contributory negligence, did not attempt to state all the facts entitling plaintiff to recover, and was therefore not erroneous in omitting the theory of assumption of risk, where that element was fully covered in another instruction. p. 388.

6. MASTER AND SERVANT.—*Injuries to Servant.—Trial.—Instructions.—Proximate Cause.*—In an action by a servant for injuries from the falling of an elevator, an instruction telling the jury that if plaintiff was injured as alleged while in the discharge of his duty as night watchman on entering an elevator that was defective and dangerous as alleged, and was known so to be by the servant whose duty it was to repair and keep same in a safe condition in time to have restored it in safe condition or to have warned plaintiff, the finding should be for plaintiff, provided he had established all the other material allegations of his complaint, and provided he did not know and could not reasonably have known or discovered the defect prior to the injury, and was in no other way chargeable with contributory negligence, was not fatally erroneous as omitting the theory of proximate cause, in view of the fact that it directs the jurors to the charge of negligence in the complaint, which avers that it was the proximate cause of the injury, and in view of another instruction fully covering the question of proximate cause. p. 389.

7. WITNESSES.—*Discretion of Trial Court.—Cross-Examination.*—In a servant's action for personal injuries, where the defense was that plaintiff was a malingerer, and defendant on cross-examination of a witness had brought out the fact that a certain doctor had refused to come to attend plaintiff when called, the admission of an answer on redirect examination that the reason the doctor would not come was because the witness' mother did not have the money to pay his charge, was within the discretion of the court and not erroneous, though the question called for hearsay evidence. p. 390.

8. APPEAL.—*Review.—Harmless Error.—Improper Argument.*—In an action by a servant for personal injuries, the effect of the statement "that little, mean, dirty insurance company", made by counsel for plaintiff in the argument, was cured by a prompt instruction from the court telling the jury that the language was improper and that it should not be considered. p. 391.

9. APPEAL.—*Review.—Harmless Error.—Improper Argument.*—The statement "you may believe a witness if you want to", made by counsel for plaintiff in argument to the jury, though an incorrect statement, was not sufficiently prejudicial to warrant a reversal,

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where the jury was fully instructed as to the credibility of witnesses and the weight of testimony, and especially when considered in the light of the circumstances under which the statement was made as disclosed by the record. p. 391.

10. APPEAL.—*Review.—Harmless Error.—Admission of Evidence.*—A voluntary and improper statement of plaintiff's wife, which was stricken out on motion, was not prejudicial. p. 392.

11. APPEAL.—*Review.—Verdict.*—The court on appeal will not disturb a verdict on the evidence if there is some evidence to support every essential element. p. 392.

From Superior Court of Marion County (81,267); *Clarence E. Weir*, Judge.

Action by Henry E. Dautrich against William B. Burford. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

William A. Ketcham, Ralph M. Ketcham, and Howe Stone Landers, for appellant.

Willard Robertson, for appellee.

SHEA, P. J.—This is a common-law action by appellee Dautrich to recover damages for injuries alleged to have been caused by the negligence of appellant in failing to furnish him with a reasonably safe place in which to work. Dautrich was injured by the falling of an elevator upon which he stepped to extinguish a light, in the line of his duty as night watchman in the printing establishment of appellant, located in the city of Indianapolis. The jury returned a verdict for appellee with damages assessed at \$2,000.

It is very earnestly insisted by appellant that the court erred in overruling the demurrer to the complaint because: (1) there is no allegation that appellant's negligence was the proximate cause of the injury; (2) the complaint "affirmatively shows that it was a freight elevator and as such it was not required by law to be provided with safety devices"; (3) "in a case such as the one at bar the complaint must negative the assumption of risk and except by way of recital this is not done and this is not sufficient in

a pleading'; (4) the complaint "affirmatively shows that the injury was due to a hazard incident to the employment as to which the rule is they are assumed by the employe".

The complaint is in one paragraph and is too long to set out here. It is enough to say that it sufficiently charges

(1) the existence of a duty on the part of appellant

1. to protect appellee from the injury complained of;

(2) a failure on the part of appellant to perform that duty; and (3) an injury resulting from such failure. And when these elements are charged they together constitute actionable negligence. *Chicago, etc., R. Co. v. Lain* (1908), 170 Ind. 84, 88, 83 N. E. 632; *Faris v. Hoberg* (1893), 134 Ind. 269, 274, 33 N. E. 1028, 39 Am. St. 261; *Shirley Hill Coal Co. v. Moore* (1914), 181 Ind. 513, 103 N. E. 802. We

adhere to and approve what was said in *Domestic*

2. *Block Coal Co. v. DeArmey* (1913), 179 Ind. 592,

604, 100 N. E. 675, 102 N. E. 99: "However desirable it may be to the courts to secure pleadings that are scientifically accurate, we are not warranted in reversing judgment solely for such reason."

It is next contended that the court erred in overruling appellant's motion for a new trial, in support of which it is assigned that the court erred in refusing to give to the jury instructions Nos. 1 to 7 inclusive, tendered by appellant, and in giving instructions Nos. 4, 7, 8, 9 and 14 on its own motion. Error is also predicated on the admission and rejection of certain evidence and misconduct of counsel in argument. No error was committed in refusing to instruct the jury peremptorily to return a verdict for appellant, which was the effect of instruction No. 1 tendered

by appellant and refused by the court. Instruction

3. No. 2 tendered by appellant, states the law correctly, but it is covered by other instructions given by the

4. court. Instruction No. 3 tendered by appellant sought to have the jury told that the elevator which caused the injury being a freight elevator, appellant was

not required to supply it with a safety device. This instruction was not pertinent to the issue as tried, and no error resulted from refusing to give it. Instructions Nos. 5, 6 and 7 in so far as they correctly state the law are fully covered by other instructions given by the court.

Instruction No. 4 given by the court upon its own motion is seriously objected to by appellant's learned counsel. It

reads as follows: "This is an action to recover 5. damages for personal injuries on the ground of negligence, and before the plaintiff can recover he must establish by a fair preponderance of the evidence: First. That he has sustained the injuries complained of, or some of them. Second. That the defendant committed the acts of negligence, or some of them, charged in the complaint. Third. That such injuries were proximately caused by the negligence of the defendant so charged in the complaint and established by the evidence. If the plaintiff has established the foregoing things, then he would be entitled to recover, unless it has also been shown by the evidence that the plaintiff was himself guilty of negligence which caused or proximately contributed to the injuries complained of, in which case the plaintiff would not be entitled to recover." This instruction is objected to on the ground that it omits the theory of assumption of risk. The instruction is subject to criticism for the reason pointed out, but the question of assumption of risk is fully covered by the court in instruction No. 11. By instruction No. 4, the jury was told that appellee could not recover if he were guilty of any negligence which "caused or proximately contributed to his injury". In *Shirley Hill Coal Co. v. Moore*, *supra*, in considering an instruction subjected to the same criticism the court said: "Appellant's criticism of this instruction is that it undertakes to set out all the essential elements necessary to show liability on the part of appellant, and therefore the omission of any one of such elements is error. We do not construe it to be a hypothetical instruc-

tion undertaking to cover the entire case; but, on the contrary, it only defines the duty of the master to furnish a reasonably safe place in which to work and to use reasonable care to guard against injury to the servant. Taken in connection with the other instructions given, we think it correct.” Under the rule there stated, error was not committed in the giving of this instruction. If an instruction attempted to state all the facts entitling the plaintiff to recover, and an essential fact be omitted, a different question would be presented. The objections urged against instructions Nos. 7, 8 and 9 given by the court on its own motion, cannot be sustained.

Instruction No. 14 is objected to because in enumerating the things required to be proved by appellee the court omits the theory of proximate cause. The language of this

6. instruction is sufficient to impress upon the minds of the jurors the fact that the injury must have been caused by the proximate negligence of appellant, for by it the jurors are told that if “you find from a preponderance of the evidence in this case that on the date in question the plaintiff was engaged in acting as night watchman for the defendant at the plant in question, and that while in the discharge of such duty and as a part of such duty the plaintiff entered the elevator in question to extinguish a light, and if you should further find that the elevator in question was defective and dangerous in the manner alleged in the complaint, and that such defective and dangerous condition was known by the defendant’s servant who was charged with the duty of keeping such elevator in repair and maintaining the same in a safe condition, a sufficient length of time prior to the receipt of the injury as that said servant of the defendant could reasonably have put the same in condition safe to the plaintiff, or warned plaintiff of its dangerous condition, and if you should find that by reason of such defective and dangerous condition the plaintiff while so in the discharge of his duties fell and

was injured, as charged in the complaint, then your finding should be for the plaintiff, provided the plaintiff has established all the other material allegations of his complaint, and provided that such dangerous and defective condition was not and could not reasonably have been known to the plaintiff prior to the time of the injury, and provided that the unusual appearance of the elevator, by reason of its slanting position or otherwise, was not such that the plaintiff could reasonably, by the use of his senses, have discovered the same before entering into said elevator, and provided further that plaintiff was not chargeable with any other contributory negligence.” The complaint sufficiently charged that the negligence of defendant was the proximate cause of the injury. The instruction directs the minds of the jurors to the charge of negligence in the complaint, and the court fully instructed the jury upon the question of proximate cause in instruction No. 4, given upon its own motion. This instruction is sufficient under the rule in *Shirley Hill Coal Co. v. Moore, supra*. These are by no means model instructions, and the practice of courts attempting to give mandatory instructions is not to be commended, but it is the opinion of this court that no harmful error resulted.

Reversible error was not committed in sustaining the objection to the question propounded to James M. Jackson, nor in permitting Dr. Emmet E. Rose to answer the question propounded to him. Appellant also urges that

7. the court erred in overruling his objection to the following questions asked the witness Rose Elslager by appellee’s counsel, upon redirect examination. “Why wouldn’t he come?” “Did Doctor Kurtz give a reason why he wouldn’t come?” and in refusing to strike out the answer thereto as follows: “He said: ‘If your mother has got five dollars to give me when I get down there I will come, and if she hasn’t got five dollars for me, I will not come’, and I said ‘My mother hasn’t got five dollars

to give you' and he said: 'Then I can't come' ". The question objected to and answered by the witness Rose Elslager, while it called for hearsay evidence, was invited by cross-examination by appellant's counsel. Appellant's counsel had brought out on cross-examination of the witness that Dr. Kurtz would not come to attend appellee when called. It is insisted by appellee that the question as follows: "Why would Dr. Kurtz not come—what reason did he give for not coming" was proper reëxamination of the witness. The defense in this case appears to have been that appellee was a malingerer. While the question calls for hearsay testimony, and under ordinary conditions would be improper, we think the question of its admission in this case, under the circumstances shown, was within the sound discretion of the trial court, and we cannot say that discretion was abused. Besides, it was not sufficiently material to warrant the court in reversing the judgment of the lower court.

It is very earnestly insisted that counsel in argument used language which was highly prejudicial. Counsel for appellee in addressing the jury used this language:

8. "that little, mean, dirty insurance company", and at another point this language: "You may believe a witness if you want to." As to the first statement,

9. upon objection being made the court promptly instructed the jury that the language of counsel was improper, and that they should not consider it in their efforts to reach a verdict. This cured whatever error was made. The law is not correctly stated in the second statement pointed out, but it is not sufficiently prejudicial to warrant this court in reversing this cause. The jury was fully instructed by the court as to the credibility of the witnesses, and weight and importance of their testimony, so that this misstatement of the law by an attorney must be taken to be cured. Besides, when taken in connection with the manner in which the language was used, as shown by

the record, the jury could not have been misled by
10. the statement. The court upon motion struck out
improper evidence of plaintiff's wife, Mrs. Lena
Dautrich, so her voluntary statement, while improper could
not be prejudicial.

Under the well known rule, this court is not able to say
that the damages awarded by the jury are excessive. It is
insisted that upon the whole record it is shown that
11. appellee was not so seriously injured as claimed, and
that the verdict is not sustained by the evidence. It
is not claimed that there is not some evidence to support
every essential element, and therefore this court will not
disturb the verdict.

We find no error in the record which warrants a reversal.
Judgment affirmed.

Felt, Hottel, Caldwell, JJ., concur.

Lairy, C. J., and Ibach, J., dissent.

DISSENTING OPINION.

IBACH, J.—I can not concur in the majority opinion in
this case. The trial court committed reversible error in
giving to the jury on its own motion instruction No. 4. I am
aware of the general rule that a single instruction need not
contain the whole law of the case, that each instruction is
not to be analyzed singly, but all the instructions given
upon any particular subject pertinent to any case are to
be taken and considered as an entirety and if as a whole
they correctly state the law, the giving of one inadequate,
when considered apart from all the others, will not be
deemed reversible error. The reason for the above doctrine
is quite apparent, but it has no application to instruction
No. 4 involved in this appeal.

This is not a case where it can be said that the instruc-
tion contained a correct statement of the law as far as it
went. Here the jury was given to understand the different
things the plaintiff would be required to establish to enable

him to recover, and in the same instruction was told that if such facts were proven, then, unless plaintiff were shown to be guilty of contributory negligence, he would be entitled to a recovery, and yet the court wholly ignored the essential element of assumption of the risk. This is a mandatory instruction and such an instruction cannot be cured by subsequent instructions correctly stating the law. This can only be done by withdrawing the erroneous instruction from the jury. This proposition, I believe, is as old, and the reason for the rule is as clear and correct as the first rule hereinbefore referred to, and it seems to me so well settled that citation of authority is unnecessary. I refer, however, to some of the most important cases. *Haskell & Barker Car Co. v. Przedziankowski* (1908), 170 Ind. 1, 9, 83 N. E. 626, 127 Am. St. 352, 14 L. R. A. (N. S.) 972; *Pennsylvania Co. v. Ebaugh* (1899), 152 Ind. 531, 534, 53 N. E. 763; *Chicago, etc., R. Co. v. Glover* (1900), 154 Ind. 584, 587, 57 N. E. 244; *Kentucky, etc., Bridge Co. v. Eastman* (1893), 7 Ind. App. 514, 34 N. E. 835; *Cleveland, etc., R. Co. v. Scott* (1902), 29 Ind. App. 519, 530, 64 N. E. 896.

The majority opinion in this case seems to have been based largely on the case of *Shirley Hill Coal Co. v. Moore* (1914), 181 Ind. 513, 103 N. E. 802, recently decided by the Supreme Court of this State, where a somewhat similar instruction to the one now under consideration was held to be sufficient. We feel quite sure, however, that had the attention of the court and of the very able judge who wrote the opinion been sufficiently called to the infirmity which we have discovered, the instruction would not have been approved. Since, however, such opinion has been construed in the manner announced by the majority of the court in this case, I feel that the opinion in the Moore case, *supra*, should be modified so as to conform to the rule as it is declared in very many well considered cases. If, however, it is the purpose of our Supreme Court to modify or change this rule, then I feel that it is due the trial courts and the

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bar of the State that the cases in which it has been held that the giving of a similar instruction was reversible error, be overruled.

Lairy, C. J., concurs in this opinion.

NOTE.—Reported in 103 N. E. 953, 956. See, also, under (1) 29 Cyc. 565; (2) 31 Cyc. 101; (3) 38 Cyc. 1711; (4) 26 Cyc. 1494; (5) 38 Cyc. 1598; (6) 26 Cyc. 1496; (7) 40 Cyc. 2524; (8) 38 Cyc. 1503; (9) 38 Cyc. 1509; (10) 38 Cyc. 1440; (11) 3 Cyc. 348.

SHORE v. OGDEN.

[No. 8,226. Filed January 15, 1914.]

1. REPLEVIN.—*Pleading.—Counterclaim.*—A counterclaim is a proper pleading in an action of replevin when the facts set up therein are so connected with the subject of the action that equity requires that the matter alleged in the complaint and the counterclaim should all be settled in the same litigation. (*Baldwin v. Burrows* [1884], 95 Ind. 81, and *Shipman Coal Co. v. Pfeffer* [1895], 11 Ind. App. 445, distinguished.) pp. 395, 396.
2. REPLEVIN.—*Pleading.—Counterclaim.*—In an action to replevy an automobile left with defendant for repairs, a counterclaim setting up a demand in favor of defendant arising out of repairs made by him while the property was in his possession, was properly pleaded. p. 396.

From Bartholomew Circuit Court; *Hugh Wickens*, Judge.

Action by John Shore against Dore Ogden. From the judgment rendered, the plaintiff appeals. *Affirmed.*

John W. Donaker and *Ralph H. Spaugh*, for appellant.

Weldon Lambert, for appellee.

LAIRY, C. J.—Appellant as plaintiff brought this action to recover from appellee the possession of an automobile, which he had previously left at the garage and repair shop of appellee for the purpose of being repaired. At the time of the commencement of the action, the automobile was in the possession of appellee who claimed that there was due him for work and labor performed and material furnished by the order and request of appellant in the repair of such

automobile the sum of \$272.88 for which he claimed a lien. The action was replevin, and the complaint was in the usual form. Appellee filed an answer in general denial and also a special answer stating the facts on which he based his lien. He also filed a counterclaim in which he stated facts showing that the appellant was indebted to him for work and labor and materials furnished in the repair of such automobile and that he had never surrendered its possession after such repairs were made and that he held the possession of such automobile by virtue of his bailee's lien until it was taken by the officer under the writ of replevin. There is a prayer for personal judgment against appellant and the foreclosure of the lien.

The jury returned a verdict in favor of the appellant on his complaint awarding him the possession of the automobile, and also returned a verdict in favor of the appel-

1. lee on his counterclaim for the sum of \$225. The court rendered judgment on the verdict. Appellant objected to the court rendering judgment in favor of appellee on that part of the verdict which is based on the counterclaim. The grounds of the objection are that a personal judgment cannot be rendered awarding defendant affirmative relief on a counterclaim in a replevin suit and that counterclaims in actions of replevin are permitted only to defeat the demand of the plaintiff. As sustaining his position, appellant cites the following cases: *Baldwin v. Burrows* (1884), 95 Ind. 81; *Shipman Coal Co. v. Pfeiffer* (1895), 11 Ind. App. 445, 39 N. E. 291.

In the first case cited, the question under consideration here does not seem to have been presented. The pleading considered in that case was treated by the court as stating a cause of defense and not as stating an affirmative cause of action in favor of the defendant. It was held that the pleading stated a good defense to the action and that the trial court was correct in overruling a demurrer addressed thereto. The second case cited by appellant is not in point.

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In that case, a pleading was filed by the defendant which was held to be insufficient as a counterclaim but sufficient as an answer. The ruling is not based on the ground that a counterclaim setting up a cause of action in favor of the defendant cannot be pleaded in an action of replevin, but the pleading is held to be insufficient as a counterclaim for other reasons.

As shown by allegations of the counterclaim filed in this case, the property which is the subject of the replevin suit was placed in the possession of appellee in order that

2. it might be repaired and the counterclaim sets up a demand in favor of appellee arising out of repairs so made while the property was in his possession. The
1. purpose of this action on the part of appellant was to deprive appellee of the possession of the property before paying for the repairs which had been made on it at his request. The cost of making such repairs is so connected with the possession of the property as to constitute it a proper subject for counterclaim. This court has held that a counterclaim is proper in an action of replevin when the facts set up therein are so connected with the subject of the action that equity requires that the matter alleged in the complaint and the counterclaim should all be settled in the same litigation. *Reardon v. Higgins* (1907), 39 Ind. App. 363, 79 N. E. 208; *Welker v. Appleman* (1909), 44 Ind. App. 699, 90 N. E. 35. The cases last cited seem to settle the question involved in this case adversely to appellant's contention.

Judgment affirmed.

NOTE.—Reported in 103 N. E. 852. As to demands which will support set-off or counterclaim, see 12 Am. Dec. 152; 89 Am. Dec. 482. For a discussion of an action of replevin as subject to a set-off or counterclaim, see Ann. Cas. 1913 A 105. See, also, under (1) 34 Cyc. 1416; (2) 31 Cyc. 226; 34 Cyc. 1417.

DEEMER ET AL. v. KNIGHT ET AL.

[No. 8,108. Filed January 16, 1914.]

1. **FENCES.**—*Partition Fence.*—*Foreclosure of Lien.*—*Complaint.*—*Burden of Proof.*—A complaint for the foreclosure of a lien for the cost of constructing a partition fence in pursuance to the provisions of §7377 *et seq.* Burns 1908, Acts 1897 p. 184, need not aver that at the time the proceedings were begun, the lands of the defendant were enclosed by a fence to retain stock, but the defendant has the burden of alleging and proving that his lands are within the exception of the statute. p. 397.
2. **TRIAL.**—*Failure to Find Fact.*—The failure of the trial court to find a fact as to which defendant had the burden of proof is equivalent to a finding against him as to such fact. p. 398.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Albert H. Knight and others against William H. Deemer and others. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

C. W. Watkins, Charles H. Butler and R. A. Kaufman, for appellants.

George M. Eberhart, Fred H. Bowers and Milo Feightner, for appellees.

HOTTEL, J.—This is an appeal from a judgment in favor of appellees foreclosing a lien for the cost of constructing a partition fence in pursuance of the provision of the act of 1897 (Acts 1897 p. 184, §7377 *et seq.* Burns 1908). There was a special finding of facts and conclusions of law. The errors relied on for reversal, call in question the ruling of the trial court on a demurrer to the complaint and the correctness of the several conclusions of law.

The objection urged to the complaint is that it contains no averments that, at the time the proceedings were begun,

the lands of the appellants Deemers were enclosed

1. by a fence to retain stock. Such an allegation was unnecessary. *Tomlinson v. Bainaka* (1904), 163 Ind. 112, 70 N. E. 155; *Collins v. Wilber* (1910), 173 Ind. 361,

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363, 364, 89 N. E. 372. The objection urged to the complaint is also urged to the special finding of facts and because of the absence of a finding of the character indicated, it is insisted, in effect, that such finding is not sufficient to support the conclusions of law stated thereon. Under the authorities cited the burden was on the appellants to allege and prove that their lands were within the exceptional class,

and the failure of the trial court to find such fact

2. is equivalent to a finding against them as to such fact. Other facts alleged in the complaint, and found by the court were, we think, sufficient in any event to show that the fence in controversy was in fact a partition fence and one which said appellants should have helped to maintain and keep in repair.

Judgment affirmed.

NOTE.—Reported in 103 N. E. 868. As to partition fences, see 68 Am. Dec. 626; 54 Am. St. 513. See, also, under (1) 19 Cyc. Anno. 474; (2) 38 Cyc. 1985.

BEARD v. GOULDING ET AL.

[No. 8,164. Filed January 16, 1914.]

1. **TRIAL.—Verdict.—Answers to Interrogatories.**—A general verdict for plaintiff decides all the material issues in his favor, and is not overcome by the jury's answers to interrogatories except when there is such antagonism between them that both cannot stand. p. 401.
2. **APPEAL.—Review.—Verdict.—Answers to Interrogatories.**—In reviewing the ruling on a motion for judgment on the jury's answers to interrogatories, the court on appeal can look only to the pleadings, general verdict and the answers to the interrogatories, and can indulge no intendments or presumptions in favor of such answers, but must reconcile them with each other and with the general verdict, if it reasonably can be done. p. 401.
3. **MASTER AND SERVANT.—Injuries to Servant.—Trial.—Answers to Interrogatories.**—In a servant's action for injuries from the breaking of a ladder, the jury by its answers to interrogatories showing that persons using the ladder or looking at it from the ground could not see that it was defective, and that plaintiff did

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not know that it was defective, considered in the light of other answers showing that the ladder was worn and old and in a dilapidated condition and that the rung which broke could be seen by one using the ladder or looking at it from the ground, and that the ladder was defective and that the rung broke because worn from use, evidently used the word "defective" as meaning "so weak as to be liable to break", and did not mean to say that one using the ladder or looking at it from the ground could not know its worn, old and decayed condition; hence such interrogatories did not conflict with each other, and the rendition of judgment for defendants thereon was not erroneous. p. 401.

4. MASTER AND SERVANT.—*Injuries to Servant.—Knowledge of Defects.—Assumption of Risk.*—An adult servant of ordinary intelligence is presumed to have been capable of ascertaining every fact which could have been apprehended by the senses of a person having the same opportunities in relation to the dangerous conditions which caused the injury, and will be held to have assumed the risk, even though such danger was created by his master's negligence. p. 404.

5. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.*—A ladder is a simple implement requiring only average intelligence to comprehend the dangers of its use, so that where an employe, who was injured by the breaking of a ladder, knew that such ladder was worn and old, he was chargeable with knowledge that it might break under his weight in using it, and assumed the risk thereof, even though the master was negligent in permitting him to use it. p. 405.

From Clark Circuit Court; *Harry C. Montgomery*, Judge.

Action by David Beard against John Goulding and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

George H. Voigt and *Stotsenburg & Weathers*, for appellant.

M. Z. Stannard, Paris & Trusty and *James W. Fortune*, for appellees.

IBACH, J.—This was an action by appellant against appellees to recover damages for personal injuries sustained by him while in their employ as an engineer in their coal elevator, and is based upon the alleged negligence of appellees in not providing a proper ladder for appellant's use in

the performance of the work he was engaged to do. The complaint, after averring facts showing the relation of master and servant, and a description of the work appellant was required to do and the character of his working place, proceeds, "that at the time of the grievances hereinafter mentioned there was kept and maintained a wooden ladder running from the first floor of said defendants' elevator down to the basement of said plant; that said ladder was about eighteen feet long and was made of wood, consisting of two upright wooden pieces about eighteen feet long, which were fastened together with wooden cross pieces or rungs placed about fourteen inches apart and being joined to the pieces on each end thereof; * * * that said ladder * * * was more than fifteen years old, and at said day and for a long time prior thereto said defendants had carelessly and negligently maintained, kept, and used said ladder which was at said time and for a long time prior thereto had been old, decayed, weak, rotten, unsafe, and unfit for use in all its parts; that said defendants at said time knew of the unsafe, unfit, weak, rotten and decayed condition or by the exercise of ordinary care and diligence could have known of the same; * * * that on June 23, 1909, plaintiff was in the employment of defendants as an engineer, engaged in running the engine on the first floor of said elevator; that on said day in the proper discharge of his duties as such servant of defendants, it became and was necessary for plaintiff to go down said ladder to the basement of said elevator, and while in the line of the duty of his employment, he started down said ladder and while using due care he stepped on the rung of said ladder, when on account of the unfit, unsafe, old, decayed, weak and rotten condition of said ladder as aforesaid, the same broke under his weight, thus and thereby precipitating this plaintiff more than fifteen feet upon the hard ground, thereby injuring him," etc., "that at the time he attempted to use said ladder and at all times prior thereto plaintiff was wholly ignorant of

the defective, unsafe, rotten and decayed condition of said ladder and that its unfit, unsafe, rotten and decayed condition was wholly unknown to him when he attempted to use the same at the time of his injury aforesaid; that his injuries were caused without any fault or negligence on his part." There was an answer in general denial, a trial by jury, and with a general verdict for \$2,000 in favor of appellant the jury returned answers to 113 interrogatories. Upon motion of appellees, judgment was rendered in their favor on the answers to interrogatories. Error is assigned in the court's sustaining the motion of appellees for judgment on the answers to interrogatories, and in rendering judgment thereon.

In considering the motion for judgment on the answers to interrogatories, it must be kept in mind that the general verdict decided all of the material issues in favor of

1. appellant, and that the answers to interrogatories will not overthrow the general verdict except when they are so antagonistic to each other that both cannot

2. stand. Another well known proposition of law controlling motions for judgment on the answers to interrogatories is that in the consideration of such a motion the court can look only to the pleadings, general verdict and the answers to the interrogatories, and nothing will be taken by intendment or presumption in favor of the answers to interrogatories to aid them in overthrowing the general verdict. It is also the duty of the court to reconcile the answers to the interrogatories with each other and with the general verdict, if it reasonably can be done. *Consolidated Stone Co. v. Summit* (1899), 152 Ind. 297, 53 N. E. 235; *Harmon v. Foran* (1911), 48 Ind. App. 262, 94 N. E. 1050, 95 N. E. 597.

The facts found by the jury in answer to interrogatories, so far as they are pertinent, are in substance as follows:

3. That appellant was employed as an engineer; that it was his duty to operate the engine situated

on the first floor of the elevator; that he had other duties to perform which required him to use the ladder; that he dropped a cold chisel from the first floor of the elevator to the basement and had gone down the ladder to procure the chisel; that there were two ways by which he could ascend from the basement to the first floor—one by means of the ladder, and the other by going up an incline; that the ladder consisted of two upright wooden pieces about eighteen feet long, fastened together with wooden cross pieces or rungs placed about fourteen inches apart and joined to the pieces on each side thereof; that the ladder fell two and one-half or three feet short of reaching from the ground to the first floor; that the ladder was old and the step in question was partly decayed, weak and unfit for use; that the rungs, and the one in question were worn from use, but were not rotten; that the worn condition of this rung rendered the ladder and this rung defective and unsafe for use; that the rungs were constructed of timbers two and one-half inches wide, one inch thick and sixteen inches long, and the rung in question was worn to the extent of one inch; that the ladder was situated outside the elevator and the step which broke was worn down as the result of being stepped upon by persons using it; that the step broke at the point where it had been worn by persons stepping upon it in using it, and broke as a result of being worn; that the defendants, or either of them could, by standing on the ground in front of the ladder see that the step which broke was old and worn at the point where it broke, but could not see that it was defective or that it was worn so thin as to be apt to break under use; that the defendants, or either of them, could, while using the ladder, see that the step which broke was old and worn at the point where it broke, but could not see or discover the defect which caused it to break; that the worn condition of the rungs, including the one in question, was open and obvious to the person using the same; and at the time appellant was injured the ladder was in full view of the

person using the same or standing on the ground in front thereof; that appellant had good eyesight and there was nothing to prevent him from seeing the step in question when passing the step and using the ladder; that if he had looked when ascending the ladder on the morning of the injury, he could have seen the size and worn condition of the step which broke with him; that he had used the ladder shortly before he was injured in ascending to or descending from the first floor of the elevator to the ground below; that in using the ladder, he took hold of its rungs with his hands and saw their worn condition; that he knew of the worn condition of the step in question, but did not know that it was defective; that he knew that he could go to and from the first floor of the elevator by means of the incline; that the incline was not a safer way to reach the first floor than the ladder; that he, before his injury, had frequently used the incline to reach the place of his employment but most frequently used the ladder to do so; that while using the ladder, or standing on the ground he could see that the step which broke with him was old and worn at the point where it broke, but not that it was defective; nor could he see from the ground that it was so thin it was liable to break; that the material of this step was unsound; that the step broke at a place where the break was new, and broke by reason of its being worn from use; that the step was in a defective condition, the nature of the defect being that it was worn and decayed; that there is no evidence that there was any latent or hidden defect at the place where the step broke, and no such latent or hidden defects were shown; that the rotted and decayed condition of the step was on its surface, and it was sound below its surface; that the step was made of poplar timber, the nature of which is to decay on the surface and not to decay within; that the step did not break because of any hidden or latent defect; that when appellant was injured he was not using the ladder in compliance with any order or instruction of the appellees or

either of them; that the round which broke was covered with grease at the time; that appellant's opportunities to discover the condition of the ladder were equal to the opportunities of the appellees, or either of them; that during the four weeks preceding the accident appellant used the ladder more times than appellees or either of them; that the ladder was defective at the time appellant was injured; that appellant did not know that the ladder was defective.

Upon first reading there seems to be conflict between some of the facts found by the jury in answer to the interrogatories. The jury finds that the worn and old and decayed condition of the ladder, and of the step which broke, could be seen by one using the ladder, or looking at it from the ground. It also finds that the ladder was defective because it was worn from use, and that the step which broke with appellant broke because it was worn from use. Yet it finds that one using the ladder, or looking at it from the ground could not see that the ladder was defective, and that appellant did not know that the ladder was defective. Perhaps this conflict may be removed if we consider that the jury used the word "defective" as meaning "so weak as to be liable to break", and that when stating that one could not see its defects, or did not know that it was defective, the jury did not mean to say that such a one did not know the worn, old and decayed condition of the ladder.

We may grant for the purposes of discussion, that the evidence may have shown, and the answers to interrogatories do not disprove, negligence of the employer in allowing the servant to use the ladder in its old, worn, and weakened condition. But "an adult servant of ordinary intelligence is presumed to have been capable of ascertaining every fact which could have been apprehended by the senses of a person having the same opportunities as he had for exercising those senses in relation to the dangerous conditions which caused the injury" (4 Labatt, Master and Servant [2d ed.] §1313), and is held to have assumed the

risk from those dangers which he is presumed to have apprehended. Usually where a servant knows the conditions which cause a risk, he is held to a knowledge of the risk. That is, if a person of ordinary intelligence who was aware of the conditions must either have understood, or have been chargeable with negligence in failing to understand, the hazards to which these conditions exposed him, such person is considered to have assumed the risk as an open, obvious danger, even though such danger was created by his master's negligence. 3 Labatt, Master and Servant (2d ed.) §§1191, 1186a.

A ladder has uniformly been held to be a simple implement, requiring only average intelligence to comprehend the dangers of its use. 3 Labatt, Master and Servant (2d ed.) §924a, notes 9, 10. *Jenney Electric, etc., Co. v. Murphy* (1888), 115 Ind. 566, 18 N. E. 30; *Meador v. Lake Shore, etc., R. Co.* (1894), 138 Ind. 290, 37 N. E. 721, 46 Am. St. 384. In the present case the ladder may perhaps be regarded more as a part of appellant's working place, rather than as a tool to work with, but that would not lessen the degree of comprehension of obvious dangers incurred in the use of a ladder which the law casts upon appellant. The jury has found that appellant knew that the ladder was worn and could see that it was old, and knew that the rung which broke was worn and could see that it was old, that the rung broke by reason of being worn from use, that the ladder was defective because worn from use and decayed, that the decay was only upon the surface, and that no latent defects were shown. It seems to us that any person of ordinary intelligence is chargeable with the knowledge that an old and worn round in a ladder may break under his weight in using it. Though the jury finds that appellant did not know that the ladder was defective, yet it finds that he knew all of the conditions which made it defective, and that knowing such conditions he had made use of it for at least four weeks, and that during that time

he used it more often than his masters, and that his opportunities for knowing of its defects were equal to those of his masters. Such being the case, appellant is chargeable with constructive, even if not with actual knowledge, that the ladder might break under his weight while using it, and must be held to have assumed the risk of using it, even though his master was negligent in permitting him to use it.

It was said in the case of *Scharenbroich v. St. Cloud Fiberware Co.* (1894), 59 Minn. 116, 60 N. W. 1093, "It is thoroughly established in the law that a servant does not necessarily assume the risks incident to the use of unsafe machinery because he knows its character and condition. He must also have understood, or by the exercise of ordinary observation ought to have understood, the risks to which he is exposed by its use. In this case it is undisputed that the plaintiff knew the exact nature of the situation. He knew that the floor was wet; that this made the floor slippery; that there was nothing, except the smooth floor, against which to brace his feet when turning the lever; that if his foot slipped there was nothing to prevent it from coming in contact with, and being caught by, the revolving pinion; and that if it did it would be injured. It required no special skill to understand these things, as they were patent to the sense upon the most ordinary observation. Indeed, he admits that he was aware of all this. His only excuse is that he did not think of his foot slipping. But in view of the situation—the floor being wet, and he in the act of applying special force to turn the lever—he must or ought, in the exercise of ordinary intelligence, to have understood that there was increased liability of his foot slipping, as this was a matter of ordinary experience, and in accordance with the most simple and familiar laws of nature. It is impossible to conceive of anything which any one could have told him, about either the situation or the risks incident to it, which was not perfectly patent to the senses, in the exercise of common observation by an adult of ordinary intelli-

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gence.” The facts of the case at bar are such that the dangers from using the ladder in question should certainly be held apparent to one whose knowledge of the conditions causing the danger was as complete as appellant’s, for no special skill or experience was required to comprehend such danger. The following cases also generally uphold our decision. *Montgomery Coal Co. v. Barringer* (1905), 218 Ill. 327, 75 N. E. 900; *Goddard v. McIntosh* (1894), 161 Mass. 253, 37 N. E. 169; *Anderson v. H. C. Akely Lumber Co.* (1891), 47 Minn. 128, 49 N. W. 664; *Rooney v. Brogan Constr. Co.* (1909), 194 N. Y. 32, 86 N. E. 814; *Armour v. Brazeau* (1901), 191 Ill. 117, 60 N. E. 904; *Warszawski v. McWilliams* (1901), 64 App. Div. 63, 71 N. Y. Supp. 680; *Borden v. Daisy Rolling Mill Co.* (1898), 98 Wis. 407, 74 N. W. 91, 67 Am. St. 816.

The court committed no error, and the judgment is affirmed.

NOTE.—Reported in 103 N. E. 875. As to assumption of risk and contributory negligence in law of master and servant, see 97 Am. St. 884; 98 Am. St. 289. As to the servant’s assumption of risk of dangers created by master’s negligence, which might have been discovered by the exercise of ordinary care on the part of the servant, see 28 L. R. A. (N. S.) 1250. As to servant’s assumption of obvious risks of hazardous employment, see 1 L. R. A. (N. S.) 272. See, also, under (1) 38 Cyc. 1869, 1929; (2) 38 Cyc. 1928; (3) 38 Cyc. 1930; (4) 26 Cyc. 1196; (5) 26 Cyc. 1186, 1213.

SULLIVAN v. INDIANAPOLIS, CRAWFORDSVILLE AND WESTERN TRACTION COMPANY.

[No. 8,189. Filed January 16, 1914.]

1. **TRIAL.**—*Questions for Court and Jury.*—It is for the court to say whether there is any evidence tending to support any material issue of fact, but if there is such evidence, its weight or probative value is for the jury. p. 413.
2. **TRIAL.**—*Motion for Peremptory Instruction.*—*Consideration of Evidence.*—In deciding the question presented by a motion for peremptory instructions, only such evidence as is favorable to the party opposed to the motion should be considered, and while a mere scintilla or suggestion of evidence is insufficient to estab-

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lish a material and issuable fact, the court should consider any fact or circumstance shown by the evidence which is pertinent to such issue, as well as any inferences which the jury might reasonably draw therefrom, and if the facts and circumstances proven are susceptible to different reasonable inferences, the direction of a verdict is erroneous. p. 413.

3. TRIAL.—*Directing Verdict.*—Where there is a total failure of evidence to prove any fact essential to recovery by plaintiff, it is the duty of the trial court, upon proper motion, to direct a verdict for defendant. p. 414.

4. MASTER AND SERVANT.—*Duties of Master.—Right of Servant to Rely on Performance of Masterial Duty.*—It is the duty of a master, which he cannot delegate so as to avoid liability, to use ordinary care to provide suitable and safe tools, appliances and machinery for his employe, and to make such reasonable inspection thereof from time to time as the nature of the use and the character of the equipment may require to keep the same in a reasonably safe condition for the intended use, and the employe may rely upon the safety of the equipment provided by the master, except as to such dangers and defects as may be ascertained by an ordinarily prudent man in the exercise of ordinary care. p. 414.

5. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.*—An employe assumes the risks ordinarily incident to his employment and is presumed to have knowledge of the defects and dangers that are open and obvious, or which may be known to him by the exercise of ordinary care. p. 414.

6. RAILROADS.—*Electric Railroads.—Duty to Servants.—Safety of Machinery and Appliances.*—The masterial duty to use reasonable care in providing suitable and safe equipment for the servant is applicable to a railway company operating cars by electricity or other motive power, and it is liable for an injury resulting proximately from a failure in that respect arising either from the incompetency of the servants to whom such duty was delegated, or from their failure, if competent, to make such reasonably careful inspection as the law requires of the master in the discharge of such duty. p. 415.

7. MASTER AND SERVANT.—*Injuries to Employe.—Jury Question.*—In a motorman's action against an electric railway company for personal injuries in a collision caused by alleged defects in the braking apparatus of the car under evidence tending to show that prior to the day of the injury the car had been turned in as defective; that defendant's employes charged with repairing cars were incompetent; that on the evening prior to the injury such employes, in the belief that the car needed repairing, worked on it and, discovering no apparent defect, placed it in position for

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use; that on the following morning plaintiff was assigned to said car and made a trip to Indianapolis, during which he experienced some difficulty in stopping, which he thought was due to snow and failure of the sand pipes to work properly; that he examined the pipes, removed an obstruction, and found the sand worked properly, and, thinking that such obstruction caused the trouble, made no further examination, and started on the return trip when the collision occurred because of the alleged defects; the questions whether such defects were obvious or ascertainable in the exercise of ordinary care, or whether they were latent and not ascertainable by plaintiff in the exercise of such care, but could have been ascertained by defendant in the exercise of due care, were properly for the jury. pp. 415, 419.

8. MASTER AND SERVANT.—*Injuries to Servant.—Master's Liability.—Effect of Rules.*—The rule of an electric railway company requiring motormen to examine their cars and ascertain their fitness before operating them, cannot change the masterial duty to exercise reasonable care to provide a safe place in which to work and safe and suitable equipment, though it is proper evidence along with other evidence bearing on the question of contributory negligence. pp. 419, 420.
9. MASTER AND SERVANT.—*Injuries to Servant.—Contributory Negligence.—Violation of Rules.*—It is a servant's duty to obey the master's reasonable rules, and if he violates them, and is injured as a proximate result, he is generally held to be guilty of contributory negligence barring a recovery, though there are exceptions to this rule. p. 420.
10. MASTER AND SERVANT.—*Reasonable Care.—Latent Defects.*—Reasonable care on the part of the master demands inspection and search for latent defects and hidden dangers, while such care on the part of the servant requires attention, and observation of obvious perils and defects only, unless the nature of his employment is such as to especially enjoin upon him a higher duty. p. 420.
11. MASTER AND SERVANT.—*Injuries to Servant.—Evidence.—Jury Question.*—In a motorman's action for injuries in a collision caused by alleged defects in the braking apparatus of his car, where there was some evidence tending to show defects in the brake shoes and brake rods, and the maladjustment of the brake shoes on the wheels, of a character that might have caused the accident, and showing that the accident was not caused by an absence of sand on the tracks, the question of whether the injury was caused by defective brake shoes and rods, preventing the brakes from checking the car when applied, was properly for the jury. p. 421.
12. MASTER AND SERVANT.—*Injuries to Servant.—Jury Question.*—

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Latent Defects in Appliances.—In a motorman's action for injuries from a collision of his car, where there was evidence tending to show that none of the devices for stopping the car worked properly, that incompetent workmen were employed to make repairs, that before the accident repairs were made requiring special skill and experience not possessed by the men making them, together with evidence showing that the braking devices failed to work at the time of the collision, a jury might reasonably have inferred that there were latent defects in the electrical and air-brake appliances which caused the collision, and which were not discoverable by an ordinarily prudent man in the exercise of ordinary care, but which defendant might have discovered in the exercise of ordinary care through inspection by competent men. p. 421.

From Superior Court of Tippecanoe County; *Henry H. Vinton*, Judge.

Action by John F. Sullivan against the Indianapolis, Crawfordsville and Western Traction Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Clyde H. Jones, John B. Murphy and Allen Boulds, for appellant.

Whittington & Williams and Haywood & Burnett, for appellee.

FELT, J.—This is a suit by appellant against appellee for damages for personal injuries alleged to have been caused by the negligence of appellee as the employer of appellant. At the close of the plaintiff's evidence the defendant moved the court for a peremptory instruction directing a verdict in its favor. The motion was sustained and the jury so instructed. Appellant moved for a new trial and the motion was overruled. From the judgment on the verdict of the jury appellant has appealed to this court and assigned as error the ruling on the motion for a new trial. The only specification therein, not waived by failure to present the question in the brief, is that the court erred in instructing the jury to return a verdict for the defendant.

The gist of the complaint is that in 1909, appellee owned and operated an electrical railway, extending from the city

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of Crawfordsville to Indianapolis, Indiana; that appellant was employed and worked as a motorman; that as such motorman it was his duty to run the cars designated by appellee; that appellee maintained car barns at the city of Crawfordsville where its cars were repaired and kept in running order by employes other than appellant; that to make the repairs it was necessary for appellee to have a competent mechanic and electrician; that prior to and at the time of appellant's injuries the appellee negligently employed and placed in charge of the repair work, incompetent and inexperienced men who were not skilled as electricians or mechanics; that appellee knew the men were incompetent to make the necessary repairs to the cars and knew it was dangerous and unsafe for its employes to operate its cars when not in proper running order; that appellant did not know the employes were incompetent; that on the evening of December 3, 1908, car No. 103 was placed in the car barn in a defective condition, in this, that the air brakes were so defective and improperly adjusted that they would not work properly and did not enable the motorman to have complete control of the car; that the brake cylinder on the air brake was not of sufficient size to properly control the car; that the electrical mechanism of the car was out of repair, so that the same could not be properly controlled and operated; that the electrical mechanism of the car was old, worn and out of repair to such an extent that the motorman in charge of the car could not reverse the same, which defects could have been ascertained and remedied by a competent electrician; that on December 3, 1908, appellee was notified of the defective condition of the car aforesaid; that appellee carelessly and negligently failed to repair the car or remedy the defects; that appellant had no notice of the defects or knowledge of the same; that appellant was not a skilled mechanic or electrician and could not ascertain the defects; that the defects were not open and apparent to one unskilled in mechanics and electrical appli-

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ances; that on the morning of December 4, 1908, appellee carelessly and negligently ordered appellant to operate the car as a motorman, without giving him any notice of the defective condition of the same as aforesaid; that in pursuance of the order aforesaid, he ran the car to Indianapolis and started to return to Crawfordsville; that he was ordered by appellee to meet and pass one of its east bound cars at Rank substation, or siding No. 2; that while approaching the siding and while more than 1,200 feet therefrom, appellant tried to stop the car by cutting off the electrical current and applying the air to the brakes, and then by using the reverse, but on account of the defective condition of the brakes and of the machinery connected therewith, the brakes failed to check the speed or stop the car and it collided with great force with the east bound car; that appellant could have stopped the car but for the defects aforesaid; that when this car collided, appellant was struck, crushed, and severely injured; that all of his injuries were caused by and were the direct and approximate result of appellee's negligence aforesaid.

Appellant claims there is evidence tending to support the material averments of his complaint. Appellee insists that there is no evidence that the car was defective in any of the particulars alleged when the appellant took charge of it on the morning of the day he was injured; that he ran the car from Crawfordsville to Indianapolis and was on the return trip when the accident happened; that he had run the car about fifty-two miles and made about twenty-five stops before the collision occurred; that the brakes worked properly up to the time of the accident and no other defects were apparent; that appellant had a better opportunity than appellee to learn of any defects in the car or its running mechanism; that the undisputed physical facts show that appellee could not by exercising ordinary care have discovered the defects that caused the accident, and that the appellant, on the facts of the case, must be held to have had

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knowledge of all that could have been ascertained about the condition of the car by the exercise of the care required by the law and to have assumed the risks that resulted in his injury.

The complaint charges several independent acts of negligence against appellee: (1) employing incompetent and unskilled men to make repairs and keep the cars in running order; (2) that car 103 was defective, and out of repair in at least three respects, viz., (a) air brake out of repair and defective, (b) brakes not properly adjusted, (c) electrical mechanism defective, old, worn, and out of repair.

If there is evidence tending to prove that appellant was injured substantially as alleged; that car 103 was out of repair and defective in one or more of the ways alleged; that some one or more of the defects were the proximate cause of his injury and such cause was not known to appellant and could not have been known to him by the exercise of ordinary care in the discharge of his duties as motorman, then the question of appellee's liability should have been submitted to the jury and it was error for the court to per-

emptorily instruct the jury to return a verdict for

1. the defendant. It is for the court to say whether there is any evidence tending to support any material issue or fact, but if there is such evidence, its weight or probative value is for the jury, and not for the court. Where

there is any conflict in the evidence, for the purpose

2. of deciding the question, presented by a motion for a peremptory instruction, the evidence favorable to the party making the motion is deemed withdrawn, and the court will consider only the evidence, if any, favorable to the opposite party. While a mere scintilla, or suggestion of evidence, is insufficient to establish a material and issuable fact, yet proof of such fact need not be made by any particular kind or class of evidence. In determining whether there is any evidence tending to prove such fact, it is the duty of the court to consider any fact or circumstance shown by

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the evidence which is pertinent to such issue, and to consider any inferences the jury might reasonably draw from such facts and circumstances. If the facts and circumstances proven by the evidence are of such a character that reasonable minds may draw different inferences therefrom, it is the duty of the court to submit the question to the jury, and

in that event, it is error for the court to direct a ver-

3. dict. If when so considered there is a total failure of evidence to prove any fact essential to the plaintiff's right of recovery, then it is the duty of the trial court upon proper motion, to direct a verdict for the defendant. *Plaskett v. Benton Warren, etc., Soc.* (1910), 45 Ind. App. 358, 360, 89 N. E. 968, 90 N. E. 908; *Cleveland, etc., R. Co. v. Gossett* (1909), 172 Ind. 525, 537, 87 N. E. 723; *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697, 701, 88 N. E. 612; *Indiana Union Traction Co. v. Keiter* (1911), 175 Ind. 268, 276, 92 N. E. 982; *Gipe v. Pittsburgh, etc., R. Co.* (1908), 41 Ind. App. 156, 161, 82 N. E. 471; *Columbian Enameling, etc., Co. v. Burke* (1906), 37 Ind. App. 518, 525, 77 N. E. 409, 117 Am. St. 337; *Sheerer v. Chicago, etc., R. Co.* (1895), 12 Ind. App. 157, 39 N. E. 756.

It is the duty of the master to use ordinary care to provide suitable and safe tools, appliances and machinery to be

used by his employe in discharging the duties of his

4. employment, and the master cannot relieve himself of the responsibility of such duty by delegating its performance to an agent or servant. The employe as-

5. sumes the risks ordinarily incident to his employment and is presumed to have knowledge of defects and dangers that are open and obvious, or which may be known by the exercise of ordinary care for his own safety. If he is injured by reason of any such risk or danger that may be so ascertained, the master is not liable.

The servant is not bound to look for hidden or latent defects and dangers or for those requiring special skill for their detection, which he does not possess. He may rely

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upon the safety of the implements, machinery, and appliances provided by the master for his use in rendering the services contemplated by his employment, unless the defects and dangers are such as may be ascertained by an ordinarily prudent man in the exercise of ordinary care for his own safety. An employer is required not only to exercise ordinary care to provide reasonably safe and suitable tools, machinery, and appliances for the use of the servant in the first instance, but to make such reasonable inspection thereof from time to time as the nature of the use and character of the machinery or appliances may require to keep them in reasonably safe condition for their intended use. *Merica v. Fort Wayne, etc., Traction Co.* (1912), 49 Ind. App. 288, 294, 97 N. E. 192; *Columbian Enameling, etc., Co. v. Burke, supra*, 522; *Chicago, etc., R. Co. v. Wilfong* (1910), 173 Ind. 308, 311, 90 N. E. 307; *Kentucky, etc., R. Co. v. Moran* (1907), 169 Ind. 18, 21, 80 N. E. 536; *Indiana Car Co. v. Parker* (1885), 100 Ind. 181, 187.

The rule requiring the master to exercise reasonable care in providing suitable and safe equipment, machinery and appliances is applicable to a railway company operating cars by electricity or other motive power. If it fails to discharge this duty and such failure is the proximate cause of the injury for which a recovery is sought, a liability arises whether such failure is due to the incompetency of the servants to whom such duty has been delegated, or to the failure of such servants, though competent, to make such reasonably careful inspection as the law requires of the master in the discharge of this duty. *Chicago, etc., R. Co. v. Ward* (1897), 147 Ind. 256, 259, 263, 45 N. E. 325, 46 N. E. 462; *Indiana Car Co. v. Parker, supra*.

There is evidence in this case tending to prove that appellant left Crawfordsville about six a. m. on December 4, 1908, and arrived at Indianapolis at 7:50 a. m., about
7. on time; that he made no special examination of the car before starting; that it was a damp, snowy morn-

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ing; that on two occasions on the run to Indianapolis the car ran ten or twelve feet beyond the place where it should have stopped; that while at Indianapolis, Sullivan examined the sand pipes and took a hammer and knocked ice out of one of them; that he and the conductor then made a test and found that the sand worked properly; that they left Indianapolis at eight a. m. on special order and reached Rank's station, or siding No. 2, about seven miles from Indianapolis, at about 8:29 a. m. where they were to pass car No. 106; that as they approached the switch, they were running about twenty or twenty-five miles an hour, and before they reached the circuit breaker, about 850 feet from the switch, Sullivan threw back the overhead switch that throws off the current from the controller; that he then used his air lever, but the brakes did not take hold; that he then threw on the "emergency" and it did no good and he then pulled the reverse lever around; that the speed of the car was not checked by such efforts and it ran right on and collided with car No. 106 and Sullivan was pinioned under parts of the car and severely injured; that both cars were carried 735 feet by the impact; that there was sand along the rails where car No. 103 ran just before the collision; that car No. 103 was run by Austin Todd, as motorman, on the afternoon of December 2 or 3, 1908, and the brake rod on the car broke; that there was no braking power after that but successful stops were thereafter made by using the reverse lever; that when he tried to stop and used the air brake, it refused to take hold at all; that the motormen were told at the barns what cars to take out; that the men employed by the appellee to make repairs and keep cars in running order were not electricians or mechanics, and were inexperienced and incompetent; that car No. 103 was in a collision in November, 1908, and the front end was mashed in and damaged and the car had to be pulled to the barns by another car; that it was repaired and brace rods put through it to hold it together; that repairs were also made on it a

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few days before Sullivan's injury, by wiring connecting air pipes with the air brake, putting on a pilot, repairing the controller, adjusting the brakes, taking up piston travel by use of a turnbuckle, and fastening a broken lug on the controller; that the bolts were wearing holes through the brake rigging; that previously the turnbuckle rods had been cut shorter and old and thinner shoes had been put on the car than those in use when the rods were cut; that the turnbuckle rods were too short when the thin shoes were on and the brakes had less power by reason thereof.

There was also evidence tending to show that some time before Sullivan's injury appellee had in his employ a Mr. Applegate, as master mechanic, who was competent to make repairs and keep the cars in running order, but he had not been with the company for some time and the men who were doing such work at the time and for some weeks prior to Sullivan's injury were inexperienced and incompetent to do some parts of the work necessary to keep the cars in running order; that it requires skill and experience to properly repair air brakes and electrical appliances; that the piston travel in the cylinder of car No. 103 was too great and did not give braking power; that the brake shoes on the car on December 4, 1908, were about half worn out and were hung too low on the wheels.

Appellant and other witnesses testified as above indicated and appellant also testified that the foreman designated car No. 103 for him to run on December 4, 1908; that he started out at about 5:45 a. m. and it was dark; that he had plenty of air pressure; that he was about 775 feet from the switch point when he first applied the brakes and about 700 feet from it when he applied the "emergency" and about 600 feet away when he threw it into the "reverse"; that at the rate of speed he was going he could have stopped in 300 feet if the brakes had worked right; that he did not attempt to reverse his car going to Indianapolis and there was no

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occasion requiring him to do so; that the only place he looked for the cause of the trouble when at Indianapolis, was at the apparatus for supplying sand; that when he found the pipe clogged he thought that it was the cause of the trouble; that rule 223 of the company provides that “a motorman must examine his car and see that it is fully equipped and in good condition for safe operation. They must make further examination while waiting on the siding and during lay overs at the Terminal Station.”

Daniel G. Offutt testified that he was employed by appellee at the time of Sullivan's injury; that he ran car No. 103 the day before Sullivan was injured, as conductor, and turned it in at 10:50 p. m.; that the car was not braking properly but he did not know what was the matter with it; that it would sometimes run 100 to 300 feet in making a stop; that he made a report to the company that night in writing, hung the card on a nail provided for that purpose and wrote on it, “car in bad order” and has not seen the card since.

Mitchell Matreu testified that he was on duty at the car barns on the night of December 3, 1908, and Bruce Delano was with him; that he directed Sullivan to take car No. 103 out on the morning of December 4; that on the night of December 3, he and Delano went over car No. 103 and examined it; that either he or Delano examined and tested the brakes; that they examined the controller and overhead, tested the air brakes and found no defect in either the braking system or other apparatus of the car; that he ran car No. 103 backwards and forwards and switched it from the shop to the car barns and placed it in position for Sullivan the night before he took it out on December 4 and noticed nothing wrong with the reverse or the brakes; that he paid no particular attention to the brakes on car No. 103 on the night of December 3 and made no tests other than starting and stopping the car and did not run it at a speed more than three miles an hour.

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It is apparent from the evidence that the employes of appellee charged with the duty of making repairs, knew or believed that car No. 103 needed repairing on the evening of December 3, 1908; that it was taken to the repair shops, worked on and returned to the barns and set into position for use on the morning of the 4th; that appellant was directed to run the car and did so in obedience to the order duly given him. These facts eliminate any question relating to notice of defects and time within which to make repairs, for appellee undertook to make needed repairs and designated the car as ready to be operated by appellant after such repairs as it deemed necessary had been made. Appellant made no particular examination of the car until he reached Indianapolis where he examined the sand pipes, found an obstruction, removed it, made a test and found that the sand worked properly. Appellant ran the car in obedience to appellee's order and he made some effort to ascertain and remedy the defects that were interfering with the operation of the car. It was a damp, snowy morning and the only difficulty on the run to Indianapolis was the failure of the car to stop promptly. We cannot say that it was unreasonable for appellant to believe that the obstruction in the sand pipes which he removed was the cause of the only difficulty he encountered in running the car to Indianapolis, nor can we say as a matter of law that in starting to make the return run under such circumstances, he was guilty of contributory negligence or that he assumed the risk that resulted

8. in his injury. The rule of the company requiring motormen to examine their cars and ascertain their fitness before operating them cannot modify or change the duty of the master enjoined by the law, of exercising reasonable care to provide a safe place in which to work and safe and suitable tools, implements and machinery to be used by the employe in discharging the duties of his employ-

7. ment. In *Vandalia Coal Co. v. Price* (1912), 178 Ind. 546, 97 N. E. 429, the Supreme Court by Morris, C. J.,

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said: "Assumption of risk, as a defense against actionable negligence depends wholly on the servant's knowledge, actual or constructive, of the existence of danger, and, in the absence of either actual or constructive knowledge there is no assumption." The question as to whether the facts, if any, which caused appellant's injury, were open and obvious, or could have been ascertained by him in the exercise of ordinary care for his own safety, and the further question as to whether there were hidden or latent defects which caused appellant's injury and which were not known to him and could not have been ascertained by him by the use of the care of an ordinarily prudent man, but which could have been ascertained by appellee by the exercise of the care enjoined upon it by the law, on the facts of this case, were all questions to be determined by the jury from the evidence. *National Fire, etc., Co. v. Smith* (1913), ante 124, 99 N. E. 829; *City of Fort Wayne v. Christie* (1901), 156 Ind. 172, 176, 59 N. E. 395.

It is the duty of an employe to obey the reasonable rules of his employer and if he violates them and is injured as a proximate result of such violation, generally, he

9. is held to be guilty of contributory negligence which will bar a recovery, though under certain conditions there are exceptions to this general rule. *Chicago, etc., R. Co. v. Hamerick* (1912), 50 Ind. App. 425, 441, 96 N. E.

649, and cases cited. The rule of the company referred

8. to in this case could in no event be made to mean that appellant was bound to look for latent and hidden dangers. It was proper evidence to be considered along with any other evidence bearing on the appellant's care, or the question of contributory negligence. Reasonable care

on the part of the master, demands inspection and

10. search for latent defects and hidden dangers, while reasonable care on the part of the servant requires attention and observation of open and obvious defects and perils only, unless the nature of his employment is such

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as to especially enjoin upon him a higher duty. *Columbian Enameling, etc., Co v. Burke, supra; Osborn v. Adams Brick Co.* (1913), 52 Ind. App. 175, 99 N. E. 530, 100 N. E. 472.

Appellee contends that there is no evidence tending to prove that any of the alleged defects existed when appellant began operating the car on the morning of December 11. cember 4, or that there were any defects which could have been discovered by any inspection required of appellee. There is some evidence, however, tending to show defects in the brake shoes, and brake rods, and the maladjustment of the brake shoes on the wheels, of a character that might have caused the accident. The thin shoes and short rods were on the car the day before and the day of the accident. The evidence tends to show that this lessened the efficiency of the brakes and that there was more or less trouble in stopping the car on both of said days. The proof also tends to show that sand was found along the track where the car ran just before the collision, which would indicate that the cause of the accident was not due to an absence of sand on the track. The jury would have a right to draw from these facts the inference that the thin shoes and short brake rods, and maladjustment of the brake shoes on the wheels, prevented the brakes from checking the speed of the car and caused the collision. *Indiana Union Traction Co. v. Abrams* (1913), 180 Ind. 54, 101 N. E. 1. Whether the accident was or was not caused by such conditions was a question that should have been determined by the jury from the evidence under proper instruction by the court.

The evidence also tends to show that none of the devices intended to stop the car worked properly on the occasion of the accident and that incompetent workmen were employed to make repairs; that numerous repairs had been made on the car shortly before the accident, some of which were of a kind requiring special skill and experience not possessed by the men who undertook to make them. In

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view of this evidence and the evidence of the failure of the braking devices to work, the jury might reasonably have inferred that there were latent defects in the electrical and air brake appliances, not discoverable by an ordinarily prudent man in the exercise of ordinary care, but which might have been discovered by appellee in the exercise of ordinary care through inspection made by men reasonably competent to do such work, and that the collision was caused by such latent defects which might have been so discovered. *Indiana Union Traction Co. v. Abrams, supra.*

For the reasons already announced we hold that the court erred in directing a verdict for the defendant. The judgment is therefore reversed with instructions to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 103 N. E. 860. As to liability of employer for defective machinery and appliances, see 98 Am. St. 289; 97 Am. St. 884. As to the servant's assumption of obvious risks of hazardous employment, see 1 L. R. A. (N. S.) 272. As to servant's assumption of risk of danger imperfectly appreciated, see 4 L. R. A. (N. S.) 990. On the assumption of risk of dangers created by master's negligence, which might have been discovered by the exercise of ordinary care on the part of the servant, see 28 L. R. A. (N. S.) 1250. For servant's assumption of risk from latent danger or defect, see 17 L. R. A. (N. S.) 76. As to servant's right of action for injuries received in obeying direct command accompanied by assurance of safety, see 30 L. R. A. (N. S.) 453. As to whether servant's disobedience of master's rules amounts to contributory negligence, see 24 L. R. A. 657. On the duty of the servant in regard to the rules promulgated by his employer, see 43 L. R. A. 350. For contributory negligence of employe in obeying direct command, see 30 L. R. A. (N. S.) 441. As to the disobedience of the rules or regulations of a master as affecting the right of a servant to recover for personal injuries, see 8 Ann. Cas. 3; 10 Ann. Cas. 152; Ann. Cas. 1912 A 84. See, also, under (1) 38 Cyc. 1514, 1516; (2) 38 Cyc. 1565, 1567; (3) 38 Cyc. 1576; (4) 26 Cyc. 1097, 1136, 1182; (5) 26 Cyc. 1177, 1213; (6) 26 Cyc. 1104, 1121; (7) 26 Cyc. 1463, 1478; (8) 26 Cyc. 1162, 1440; (9) 26 Cyc. 1267; (10) 26 Cyc. 1139, 1251; (11) 26 Cyc. 1460; (12) 26 Cyc. 1450.

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EGAN v. LOUISVILLE AND SOUTHERN INDIANA TRACTION COMPANY.

[No. 8,183. Filed January 27, 1914.]

1. **APPEAL.—Theory of Case.—Review.**—Where appellant failed to set out in his brief a copy of the complaint, but has set out therein the instructions given at his request, and containing the substance of his complaint from which it is disclosed that the theory at the trial was that of a common-law action for negligence arising out of the relation of master and servant, he will be confined to that theory on appeal and will not be permitted to urge that the action was based on subd. 2 of §1 of the Employers' Liability Act (§8017 Burns 1908, Acts 1893 p. 294). p. 424.
2. **APPEAL.—Briefs.—Ruling on Motion for Judgment on Answers to Interrogatories.**—To present error in the ruling of the trial court on a motion for judgment on the jury's answers to interrogatories, appellant's brief should contain a copy of the pleadings, or their substance. p. 425.
3. **TRIAL.—General Verdict.—Scope.**—A general verdict for plaintiff finds for him upon every material issue presented by the complaint. p. 425.
4. **MASTER AND SERVANT.—Injuries to Servant.—Complaint.—Burden of Proof.—General Verdict.—Answers to Interrogatories.**—Where the complaint in a common-law action by a servant against the master for personal injuries was grounded on defendant's failure to furnish a safe place of work, averring that defendant failed to take proper precautions to protect an embankment which caved and caused the injury, that the character of the place and the condition of the ground was such that the soil was likely to cave in, which defendant knew or could have known in the exercise of ordinary care, and that plaintiff was ignorant of the conditions and relied upon defendant exercising due care for his safety, the burden was upon plaintiff to show knowledge by defendant of the dangerous conditions long enough before the accident to have repaired same or to have warned plaintiff, so that answers to interrogatories showing that defendant had no such knowledge were sufficient to overcome the general verdict for plaintiff. pp. 426, 427.
5. **TRIAL.—General Verdict.—Answers to Interrogatories.**—A general verdict is controlled by the jury's answers to interrogatories only when the latter are in irreconcilable conflict with it. p. 427.
6. **MASTER AND SERVANT.—Injuries to Servant.—Railroad Construction.—Assumption of Risk.**—A motorman operating a car drawing a plow on an uncompleted track on which no passenger

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or freight trains had been run was engaged in construction work and assumed the risk incident to such employment. p. 427.

7. MASTER AND SERVANT.—*Injuries to Servant.—Verdict.—Answers to Interrogatories.*—Where plaintiff averred that at the time of his injury he was performing his service under a special order of defendant's roadmaster, but did not allege that he was directed to do the work at any particular place, a general verdict for plaintiff does not include a finding that he was directed to do the work at the particular place which proved to be dangerous, so that a general verdict for plaintiff was overcome by answers to interrogatories showing that the manner of doing the work was left to plaintiff's discretion. p. 428.

From Clark Circuit Court; *Harry C. Montgomery*, Judge.

Action by John J. Egan against the Louisville and Southern Indiana Traction Company. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

James W. Fortune, for appellant.

George H. Voigt, for appellee.

IBACH, J.—This is an action at common law for negligence arising out of the relation of master and servant. Appellant has averred some facts which might be held to be sufficient to support a complaint drawn under subd. 2 of §1 of the Employers' Liability Act (Acts 1893 p. 294, §8017 Burns 1908), but we are not required to determine this question because the record and the briefs of both parties make it apparent that the theory upon which the cause was tried in the court below was, that the defendant did not furnish plaintiff a safe place to work, and because of this neglect of duty he was injured.

Appellant has failed to set out in his brief a copy of his complaint, but has set out the instructions which were given to the jury at his request, one of which fairly con-

1. tains the substance of his complaint, and in this manner our attention has been called to it. In the same instruction where he refers to the substance of his complaint he says "this is an action at law," and "the theory of the complaint is that the defendant failed to provide the plain-

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tiff with a reasonably safe place to work; that it knew, or by the exercise of ordinary care and prudence could have known, that the place where he was employed was dangerous and would cave in and give way under his weight, and that he had no knowledge of that fact and could not ascertain that fact by the exercise of ordinary care and diligence.” No-where in the complaint is any reference made to the section of the statute above mentioned, nor does it appear to have been referred to at the trial, but in appellant’s brief he now claims that the action was brought under that statute. The theory adopted by appellant in the court below, particularly evidenced in the statements embodied by him in his instructions tendered, to the effect that the complaint counts on the common law liability of the master and not on the Employers’ Liability Act, will be taken as controlling the theory to be considered by this court, and appellant will not here be permitted to shift that theory to some other. *Baldwin v. Siddons* (1910), 46 Ind. App. 313, 318, 90 N. E. 1055, 92 N. E. 349.

The issues in the case were closed by the filing of an answer in general denial. The jury returned a verdict for appellant, together with answers to a number of interrogatories. Appellant has assigned many errors, all of which have been waived by his failure to present them, except those relating to the court’s action in sustaining appellee’s motion for judgment in its favor on the answers to interrogatories, notwithstanding the general verdict.

Rule 22 of this court requires the briefs to contain a

2. concise statement of so much of the record as fully presents every exception and error relied on. In order to present to this court error in the ruling of a trial court upon a motion for judgment upon answers to interrogatories, either the complaint or its substance must appear in the briefs. A general verdict for a plaintiff finds
3. for him upon every material issue presented by the complaint, and in the absence of the complaint or

its substance, we cannot ascertain what was determined by the general verdict. While in the present case the complaint has not been set out in the customary manner, we feel that its substance is sufficiently shown for us to consider the errors assigned, though we do not mean to hold that in all instances briefs can be said to sufficiently set out a complaint where it only appears by means of the instructions.

The substantial charges of the complaint are that appellant was employed by appellee as a motorman running a motor car on a line of electric railway between Jef-

4. fersonville and Sellersburg, Indiana; that on the date of his injury he was arranging to attach a beam or timber to the car which he was operating in order to pull a plow and plow the ditches along the tracks; that while doing this work, as directed by appellee's roadmaster, the ground upon which he was standing, near the edge of a stone quarry, on the company's right of way, gave way and caved in beneath him, and he was thereby thrown to the bottom of the quarry, and his leg was broken; that at the time of his injury he was acting under the instruction of his superior in appellee's employment; that appellee failed to take proper precautions to support the embankment upon which he was standing, so as to prevent its giving way; that the character of this place and the condition of the ground was such that the soil was likely to cave in, which fact appellee knew or could have known by the exercise of ordinary care, and that plaintiff was ignorant of the dangerous conditions, because of which he was injured and by reason of which the place upon which he was standing gave way under him; that he relied upon the appellee exercising due care for his safety; that he was doing the work assigned to him, and while thus engaged was injured.

The general verdict necessarily found for appellant upon all the material issues involved, and the action of the trial court in sustaining appellee's motion, was error unless there

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is antagonism between the answers to the interrog-
5. atories and the general verdict of such a character that
it cannot be removed or reconciled by any evidence
properly admissible under the issues. *Consolidated Stone Co.*
v. Summit (1899), 152 Ind. 297, 53 N. E. 235. The burden
was upon appellant to prove that appellee had knowl-
4. edge, actual or constructive of the dangerous condi-
tion of the bank where appellant fell, long enough
before the accident occurred to have repaired it or to have
given appellant timely warning of its condition and the
general verdict finds that appellee did have such knowledge,
but the answers to interrogatories submitted on this phase
of the case show that appellee had no knowledge of the
defective and dangerous condition of the perpendicular wall
of the quarry, that there was no evidence of the exact time
such wall became unsafe, or of when it became unsafe, and
it is found in answer to interrogatory No. 33 asking the
jury to state in detail in what respects the wall was danger-
ous and defective merely that there was a latent defect.
These answers show that appellee had neither actual nor
constructive knowledge of any defective condition of the
place where appellant alleges he was required to work, and
they therefore are equivalent to finding that appellant has
failed to prove one of the material averments of his com-
plaint. *Indianapolis Abattoir Co. v. Temperly* (1903), 159
Ind. 651, 64 N. E. 906; *Chicago, etc., R. Co. v. Wilfong*
'(1910), 173 Ind. 308, 90 N. E. 307, and cases cited.

As to the nature of the work which appellant was doing
when injured, it is found that the part of the interurban
railroad on which he was working at the time he was
6. injured was not in a finished and completed state,
that neither passenger nor freight trains were being
run over it, that it was not used by trains or cars other
than cars used in constructing and repairing such part of
said road, and that part of the road was not completed
and opened for passenger and freight train traffic until

long after the time of appellant's injury. These answers conclusively show that appellant was engaged at work on a construction car and when injured was actually engaged in construction work upon an incompleated road. In the case of *Baltimore, etc., R. Co. v. Welsh* (1897), 17 Ind. App. 505, 47 N. E. 182, this court said that a brakeman on a construction train engaged in the construction of a road and making the same safe for travel, knowing the road was incompleated and that no trains other than the construction train had passed over it, by the acceptance of such employment assumed all risks incident to the service. Applying this doctrine to the facts of this case as found by the jury, it must be said that appellant assumed the risks incident to his employment and that the answers of the jury above set out are in conflict with the general verdict.

Appellant also avers that he performed his service under a special order given him by appellee's roadmaster, but upon this branch of the case the jury finds as follows:

7. lows: "14. Did Peter McGuire, in the month of March, 1907, issue a general order to plaintiff Egan and the section crew to get ready to plow the ditches along the side of the tracks of the interurban road between the eastern corporate limits of Jeffersonville and the town of Charlestown and Sellersburg, respectively, in Clark county. Indiana? Yes. 15. Did said Peter McGuire in issuing said general order specially or generally designate the place where the motor car was to be equipped for plowing the said ditches? Yes. 16. Did said Peter McGuire, on April 15, 1907, say to plaintiff and the section gang under the section foreman, John Sykes, that Mr. Cole wanted the plowing to commence on the day after that date, and then told them to get ready to do the plowing at that time? Yes. * * * 23. Was the manner of preparing the car. for the purpose of pulling the plow, with which it was proposed to do the ditching, left to the discretion of the plain-

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tiff by the roadmaster, Peter McGuire? Yes. 24. Was the manner of fixing the beam on the motor car with which it was proposed to pull the plow left to the mechanical skill of the plaintiff by the roadmaster, Peter McGuire? Yes. * * * 28. Was there a place at the south end of the cut within full view of the plaintiff, the distance only being sixty feet away, where he could have run his car and performed the work of getting ready to put the beam thereon in perfect safety and without any danger of falling into the quarry? Yes.”

These answers may not be such as to preclude a showing by the evidence that appellant was ordered specially to prepare his car for plowing in the particular place where he was at work when injured, were such a finding in favor of appellant included within the general verdict, but a careful reading of the complaint reveals the fact that it nowhere charges that appellant was directed to prepare the car in a particular place, but only avers that he was directed to attach the aforesaid beam to the car, and while acting under the direction and orders of defendant's superior agent and in the performance of his duties as aforesaid, he stepped from the motor car upon the pathway at the place where it later gave way, and was preparing to attach the beam under the direction of his superior, when the path and wall gave way and he was thrown to the bottom of the quarry and injured. There is no direct averment that he was ordered to do this work at a particular place, therefore the general verdict does not include any such finding in his favor. The averment that he was doing the work under the direction of his superior must be held under facts of this case to apply to the manner of doing the work, and the answers to interrogatories find specifically that the manner of doing the work was left to his discretion. The court did not err in granting appellee's motion for judgment on the answers to interrogatories.

Judgment affirmed.

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NOTE.—Reported in 103 N. E. 1100. As to assumption of risk and contributory negligence in law of master and servant, see 97 Am. St. 884; 98 Am. St. 289. As to knowledge as element of employer's liability, see 41 L. R. A. 33. See, also, under (1) 2 Cyc. 672; (2) 2 Cyc. 1013; (3) 38 Cyc. 1869; (4) 26 Cyc. 1514; 38 Cyc. 1927; (5) 38 Cyc. 1929; (6) 26 Cyc. 1177; (7) 26 Cyc. 1513.

BESS v. MORGAN, ADMINISTRATOR.

[No. 8,638. Filed January 27, 1914.]

1. APPEAL.—*Review.—Harmless Error.—Ruling on Demurrer to Complaint.*—Where it appears from the jury's answers to interrogatories that the verdict was based upon a good paragraph of complaint, the error, if any, in the overruling of a demurrer to another paragraph is harmless. p. 432.
2. APPEAL.—*Review.—Ruling on Motion for New Trial.*—Where the verdict was not contrary to law and there was evidence to support every material allegation of the complaint, the court did not err in overruling the motion for new trial urging that the verdict was contrary to law and not sustained by sufficient evidence. p. 433.

From Henry Circuit Court; *Ed Jackson*, Judge.

Action by Eric C. Morgan, administrator of the estate of John M. Beavers, deceased, against George Bess. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Brown & Beard and *Clarence M. Brown*, for appellant.

J. L. Shelton and *Forkner & Forkner*, for appellee.

SHEA, J.—This was an action in replevin by appellee as administrator of the estate of John M. Beavers, deceased, against appellant Bess to recover possession of certain personal property of which it is alleged decedent died seized, and which was taken and detained by appellant. The complaint was in two paragraphs, the first containing the usual and formal allegations for replevin. The second paragraph sets out the same facts as the first, alleging in addition that decedent bought certain well cleaning apparatus and equipment of the Star Drilling Machine Company of Akron,

Ohio; that at the time of the purchase decedent was living with appellant and his parents, and was an old man, feeble in mind and body and easily influenced; that appellant and his parents, knowing his condition, intentionally and fraudulently induced decedent to enter into a pretended partnership with appellant for the purpose of operating the drilling machine, and conspired together for the purpose of depriving decedent of his property without compensation, and did obtain possession thereof. Decedent paid all that was paid of the purchase price, and he and appellant executed a mortgage to the company on the property for \$1,351, as the unpaid balance of the purchase price. Subsequently decedent paid \$450 on the mortgage, but appellant has not paid anything thereon, being at the time the property was purchased and now totally insolvent. Appellant now claims all of the property by virtue of a pretended gift from decedent to him. At the time of his death decedent was also the owner of certain other personal property which he bought and paid for with his own money, including a team of draft horses and a driving horse and a buggy. Appellant did not pay anything whatever on the purchase price of same; that appellant and his parents, knowing decedent was of unsound mind, intentionally and fraudulently induced him to make a pretended gift to appellant of all the property and since decedent's death appellant has taken possession thereof and claims the same as his own as a gift from decedent; that appellant's possession is fraudulent and unlawful, and appellee as administrator is entitled to immediate possession of same. The first paragraph of complaint was not demurred to. Appellant's demurrer to the second paragraph was overruled. Answer in general denial. Verdict and judgment for appellee for possession of the property.

With its general verdict the jury returned answers to twelve interrogatories, the substance of which is as follows: Decedent, John M. Beavers, signed the notes, mortgage and contract given for the Star drilling machine in litigation in

this case, as principal. There was no partnership existing between decedent and appellant Bess at the time the machine was purchased and delivered, nor afterwards. At the time of the purchase and delivery of the machine, decedent was of unsound mind. There was no fraud practiced upon decedent in the purchase and delivery of the machine. Decedent did not buy the team of draft horses, sued for in this action, for appellant. There was no fraud practiced upon decedent by appellant Bess in the purchase of the team. Decedent at the time of the purchase of the horses did not have sufficient capacity of mind to understand the nature of the transaction, the kind of property he was buying, and the value of it. He did not buy the driving horse and buggy sued for in this action for appellant Bess, and at the time this purchase was made did not have sufficient mind to understand the nature of the transaction, the kind of property he was buying and the value of it. None of the property sued for was delivered over to the possession of appellant Bess.

The errors relied on for a reversal are the overruling of appellant's demurrer to the second paragraph of complaint and the overruling of his motion for a new trial. It is very earnestly insisted by counsel for appellant that error was committed by the court in overruling the demurrer to the second paragraph of complaint.

It is clear from the answers to interrogatories that the verdict of the jury is based upon the first paragraph of complaint. The interrogatories and answers thereto

1. show that all the property in question was purchased by John M. Beavers with his own money; that a partnership between John M. Beavers and appellant Bess at no time existed; that title to the property did not pass to Bess by gift, and that the property was not delivered to appellant Bess by Beavers during his lifetime. The general verdict is a finding in favor of appellee upon all the material issues presented by the first paragraph of complaint. The decisions of our courts are uniform in holding that

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where the verdict of the jury is clearly based upon a good paragraph of complaint, the error, if any was committed in overruling a demurrer to a bad paragraph of complaint, is harmless. While we do not decide that the second paragraph of complaint is bad, we do hold that if error was committed, it was harmless. *Lake Erie, etc., R. Co. v. Voliva* (1913), 53 Ind. App. 170, 101 N. E. 338; *Ervin v. State, ex rel.* (1898), 150 Ind. 332, 346, 347, 48 N. E. 249; *Curless v. Watson* (1913), 54 Ind. App. 110, 100 N. E. 576; *Model Automobile Co. v. Sterling* (1912), 51 Ind. App. 78, 99 N. E. 51; *Indianapolis Southern R. Co. v. Tucker* (1912), 51 Ind. App. 480, 98 N. E. 431; *Terre Haute, etc., Traction Co. v. Phillips* (1912), 49 Ind. App. 643, 97 N. E. 1014.

No error was committed in overruling the motion for a new trial, as the verdict is not contrary to law and there is

evidence to support every material allegation con-

2. tained in the complaint. This court will not reverse a judgment where there is evidence sustaining every material point. *Crawfordsville Trust Co. v. Ramsey* (1912), 178 Ind. 258, 281, 98 N. E. 177; *Evansville Gas, etc., Co. v. Robertson* (1914), ante 353, 100 N. E. 689.

Judgment affirmed.

NOTE.—Reported in 103 N. E. 1086. See, also, under (1) 31 Cyc. 358; (2) 3 Cyc. 348.

TEMPLER v. LEE.

[No. 8,175. Filed January 28, 1914.]

1. EVIDENCE.—*Admissions.—Pleadings.—Claims.*—A claim filed against an estate, and withdrawn, was admissible as an implied admission against the plaintiff in a subsequent action against the widow of decedent to recover for the same services. p. 435.
2. EVIDENCE.—*Admissions.—Pleadings.—Conclusiveness.*—Under some circumstances admissions contained in pleadings are conclusive for the purposes of the trial, as where they contain no conflicting statements respecting the subject-matter of the admis-

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sion; but a withdrawn and abandoned paper in another cause, though admissible in evidence, is merely evidence of an admission and not conclusive, and may be rebutted and all the circumstances of its making explained; hence in an action against the widow of a decedent to recover for services rendered, where a claim filed by plaintiff against the estate was introduced on the theory of an admission against plaintiff, it was not error to permit plaintiff to show that the claim was filed against the estate on advice of an attorney and that on discovering her error she withdrew it and instituted the action against defendant by whom she was employed. p. 437.

3. APPEAL.—*Review.—Harmless Error.—Admission of Evidence.*—Error, if any, in admitting proper evidence on cross-examination, rather than in rebuttal, was a mere irregularity not warranting reversal. p. 438.
4. TRIAL.—*Limiting Effect of Evidence.—Duty of Parties.*—Where a party fears an improper application of evidence admitted for a special purpose, it should request an instruction limiting the effect of such evidence. p. 438.

From Delaware Circuit Court; *Frank Ellis*, Judge.

Action by Mary Lee against Susan Templer. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Silverburg, Bracken & Gray, for appellant.

John F. Meredith and *George W. Cromer*, for appellee.

CALDWELL, J.—Appellee alleges in her complaint in substance that James M. Templer, appellant's husband, was of unsound mind; that appellant employed appellee to nurse and care for him; that pursuant to such employment, appellee did nurse and care for James M. Templer for a period of twenty-nine weeks and four days, commencing August 5, 1907, and terminating February 28, 1908; that appellant agreed to pay appellee therefor such sum as the services were reasonably worth; that the services were reasonably worth \$590, which sum is due appellant and unpaid.

The cause having been put at issue was tried by a jury. Verdict and judgment for appellee in the sum of \$345.86. The error assigned is based on the overruling of appellant's motion for a new trial. Under this assignment, there is discussed the court's action in admitting certain evidence, and

also in overruling motions to strike out the same. The facts necessary to an understanding of the questions presented are as follows: James M. Templer, having died, appellee, on November 11, 1909, caused to be filed against his estate a claim in her behalf based on the identical services described in the complaint. This claim was withdrawn before the complaint in this action was filed. At the trial of this cause, appellant called appellee as a witness, and showed by her that the claim bore her signature, and that she had filed it against the estate. Appellant then introduced the claim in evidence. The claim is in the usual form, and is signed and sworn to by appellee. It alleges that the estate is indebted to appellee in the sum of \$590 for nursing and caring for James M. Templer during the period alleged in the complaint herein, which sum is due and unpaid. On cross-examination, the court permitted appellee to state in substance that she consulted Mr. Koons, a lawyer, and, in the absence of appellant, explained to him that appellant employed her to perform the services and promised to pay her for the same; that Mr. Koons said the best thing to do was to file a claim against the estate; that appellee did not know what was a proper course to take in order that she might collect the claim, and that she supposed her lawyer knew what was right, and that he had her put the claim against the estate; that Mr. Koons prepared the claim, and said to appellee that it would be all right; that later appellee concluded she had made a mistake; that she then said to Mr. Koons in substance that it was not right to file the claim against the estate; that the Templer heirs did not employ her; that appellant hired her and promised to pay her, and that she was the right one to pay her.

Appellant challenges the substance of the evidence, rather than the form of the questions, or the language in which the answers were couched. The basis of appellant's

1. objections and motions to strike out is to the effect that the evidence sought is not proper to be elicited

on cross-examination; that it is self-serving and contradictory of a written instrument, which should speak for itself. The court, in ruling on the objection, stated, in the presence of the jury, that the evidence sought, including what was said between appellee and Mr. Koons did not bind appellant; that it could have no force or effect other than to explain why she filed the claim, and that the court would so instruct the jury if desired; that if appellee was deceived or tricked, or the filing of the claim was not her voluntary act, or if she did it under a mistake, she had a right to make her explanation to the jury. The claim was evidently admitted in evidence as a statement made by appellee, to the effect that the estate was indebted to her for the value of the services described in the complaint in this action, and as a consequent implied admission that appellant did not hire her to perform the services or promise to pay her for the same, and was not, therefore, indebted to her for the value of the services. Although appellant was not a party to the claim, and it had been withdrawn before the filing of the complaint in this action, still it was properly admitted in evidence on that theory. *Boots v. Canine* (1884), 94 Ind. 408; *Cleveland, etc., R. Co. v. Gray* (1897), 148 Ind. 266, 46 N. E. 675; *Ager v. State, ex rel.* (1904), 162 Ind. 538, 542, 70 N. E. 808; *Holland v. Spell* (1896), 144 Ind. 561, 22 N. E. 1014; *Baltimore, etc., R. Co. v. Evarts* (1887), 112 Ind. 533, 14 N. E. 369; *Springer v. Drosch* (1870), 32 Ind. 486, 2 Am. Rep. 356; *Pope v. Allis* (1885), 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393; *Shafter v. Richards* (1859), 14 Cal. 125; *Lamar v. Pearre* (1892), 90 Ga. 377, 17 S. E. 92; *Printup v. Patton* (1893), 91 Ga. 422, 18 S. E. 311; *Robbins v. Butler* (1860), 24 Ill. 387, 427; *Ayers v. Hartford Fire Ins. Co.* (1864), 17 Iowa 176, 85 Am. Dec. 553; 1 Ency. Ev. 425, 434.

It is true that under some circumstances admissions contained in pleadings are conclusive. Such is the case where the trial is had on a complaint that contains no conflicting

statements in its various paragraphs respecting the

2. subject-matter of the admission, or in case of an answer or a reply of a like nature. An admission made in such a pleading is, for the purposes of such trial, conclusive, as long as the pleading stands. The claim, however, being a withdrawn and abandoned paper in another cause, was not conclusive as an admission against appellee. It was merely evidence of an admission. If appellant had introduced evidence to the effect that appellee had verbally admitted in conversation with some witness that the estate was indebted to her on account of the performance of the services, she would not have been concluded thereby. It would have been her right to rebut or to explain or qualify by giving in evidence the entire conversation on the subject of the alleged admission that the jury might determine whether such admission had been made, and if so, what weight should be assigned to it in the light of the attending facts and circumstances. The signing and filing of the claim, together with its substance or contents did not necessarily constitute the entire transaction of the implied admission. There may have been facts and circumstances which, when taken as a part of the transaction, would very much minimize or utterly destroy the force of the claim as an admission. The sequel showed that according to appellee's version, there were such facts and circumstances, sufficient to be submitted to the jury for consideration. The court properly permitted appellee to give in evidence such attending facts and circumstances, including the statements made as a part of the transaction, in order that it might be definitely characterized and elucidated. It seems to be the universal rule that where a paper or pleading such as this claim is introduced in evidence against a party as an admission, such party may rebut or explain it, and to that end may give in evidence the circumstances under which it was signed and filed. We hold, therefore, that the court did not err in admitting this evidence or in refusing to strike it out on motion. The follow-

ing authorities sustain us: *Baltimore, etc., R. Co. v. Evarts, supra*; *Boots v. Canine, supra*; *Cleveland, etc., R. Co. v. Gray, supra*; *Louisville, etc., R. Co. v. Hubbard* (1888), 116 Ind. 193, 18 N. E. 611; *Kentucky, etc., Cement Co. v. Cleveland* (1892), 4 Ind. App. 171, 30 N. E. 802; *Baldwin v. Siddons* (1910), 46 Ind. App. 313, 319, 90 N. E. 1055, 92 N. E. 349; *Harrod v. Bisson* (1911), 48 Ind. App. 549, 555, 93 N. E. 1093; *Blanks v. Klein* (1892), 53 Fed. 436, 3 C. C. A. 585; *Clemens v. Clemens* (1871), 28 Wis. 637, 642, 9 Am. Rep. 520; *Geary v. Simmons* (1870), 39 Cal. 224; *Valley Planting Co. v. Wise* (1909), 93 Ark. 1, 123 S. W. 768, 26 L. R. A. (N. S.) 403; *Arnd v. Aylesworth* (1909), 145 Iowa 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638; *McDermott v. Mahoney* (1908), 139 Iowa 292, 115 N. W. 32, 36, 116 N. W. 788; *Shipley v. Reasoner* (1893), 87 Iowa 555, 54 N. W. 470; *Wickens v. Clawson* (1908), 50 Tex. Civ. App. 82, 110 S. W. 103, 106; 2 Chamberlayne, Mod. Law of Ev. §1249; 8 Ency. Pl. and Pr. 21, 22; 1 Greenleaf, Evidence (14th ed.) §201; 1 Ency. Ev. 425, 432, 434; 1 Wharton, Evidence (3d ed.) §838.

If it should be conceded that this evidence was improperly admitted on cross-examination, rather than in rebuttal, the proceeding amounted, under such concession, to no

3. more than a mere irregularity, not sufficient to constitute prejudicial error. *Tobin v. Young* (1890), 124 Ind. 507, 513, 24 N. E. 121.

If appellant feared that the jury might erroneously apply the evidence to the substance of the case, rather than as against the admission only, it would have been the

4. duty of the court on request to limit the effect of the evidence by an instruction. *Harrod v. Bisson, supra*. There being no error in the proceeding, the judgment is affirmed.

NOTE.—Reported in 103 N. E. 1090. See, also, under (1) 16 Cyc. 971; (2) 16 Cyc. 1045, 1050; 31 Cyc. 91; (3) 38 Cyc. 1359; (4) 38 Cyc. 1750.

HARMON ET AL. v. POHLE.

[No. 8,778. Filed January 28, 1914.]

1. **APPEAL.—Subsequent Appeal.—Law of the Case.—Sufficiency of Complaint.**—A former judgment on appeal rules the case on a subsequent appeal involving the same questions, so that where in the former opinion the court on appeal in holding the complaint sufficient said that its sufficiency depended “upon the construction of the lease made by appellee to appellant”, and then set out the portions of the lease pertinent to the questions under consideration, appellant on a subsequent appeal of the same case cannot urge the objection that the former appeal did not adjudicate the sufficiency of the complaint as against the objection that the lease was not properly made a part thereof, since that was a subsidiary question that was necessarily determined when the complaint was considered and held good. p. 441.
2. **APPEAL.—Subsequent Appeal.—Law of the Case.—Incidental and Subsidiary Questions.**—Although, as to incidental questions that were not considered and decided on a former appeal, the decision is not conclusive or binding on the court on a subsequent appeal of the same case, where such subsidiary and incidental questions were necessarily involved and the decision could not have been reached in the absence of either an express or implied decision of such questions, the judgment on such former appeal rules the case throughout all its subsequent stages either in the *nisi prius* courts or courts of appellate jurisdiction. p. 442.
3. **APPEAL.—Briefs.—Sufficiency.—Good Faith Effort.**—Although appellant’s briefs are subject to criticism as not fully complying with the rules of court, where they disclose a good faith effort to comply therewith, such questions as may be definitely ascertained therefrom will be considered and decided. p. 442.
4. **LANDLORD AND TENANT.—Construction of Lease.—Former Appeal.**—Even though the court on a subsequent appeal of the same case believed that the construction placed upon a lease by the court on the former appeal was incorrect, such former decision would control. p. 442.
5. **TRIAL.—Issues.—Misleading Instructions.**—Where a lease provided that the lessee was to build a barn “on some part of the above described real estate owned by the lessor”, but such lease did not cover all the land of the lessor which was described therein, and the complaint alleged that “plaintiff and defendants after the execution of said lease further agreed that said written lease should be further changed in that the barn provided for

should be built" according to certain specifications, instructions telling the jury that the substance of the complaint was that the lease should be changed "so that defendants were to build a barn on plaintiff's real estate so leased to defendants", etc., were misleading and confusing as to the issue tendered by such complaint. p. 443.

6. **APPEAL.—Review.—Instructions.**—Although an instruction that "defendant's answer in general denial * * * places upon him the burden of proving every material allegation of his complaint" was erroneous in the use of the word "him" instead of "plaintiff", the question of whether it was prejudicial was immaterial in view of reversible error in other instructions. p. 444.
7. **TRIAL.—Issues.—Misleading Instructions.**—In an action on a lease, where the answer alleged that the actual agreement was that lessee was to clear fifteen acres every two years and that by mutual mistake the lease did not express the real agreement, and the prayer was for a reformation of the lease to express such agreement, an instruction that the substance of defendants' answer was that defendants were only to clear fifteen acres every two years "instead of fifteen acres every year as alleged by the plaintiff", was misleading in that it indicated that defendants were relying on the lease as written, whereas the real issue tendered by the answer was that of the reformation of the lease to express the actual contract. p. 444.
8. **TRIAL.—Issues.—Misleading Instructions.**—In an action involving an issue as to the reformation of the lease sued on, an instruction as to the burden of proof under the pleading tendering such issue, stating that "reformation is a much more delicate remedy than rescission", was erroneous, since there was no issue involving rescission and the instruction left the jury to speculate on the suggested comparison. p. 445.
9. **TRIAL.—Instructions.—Burden of Proof.**—An instruction that defendants had the burden of proving their counterclaim by a fair preponderance of the evidence, and that such "evidence must be of the most persuasive character" was erroneous in specifying the character of evidence required. p. 445.
10. **REFORMATION OF INSTRUMENTS.—Contracts.—Burden of Proof.**—One seeking the reformation of a contract must clearly and fully establish by a fair preponderance of the evidence the provisions of the actual contract between the parties, that the instrument fails to express such contract, and that such failure was due to mutual mistake of fact or other ground authorizing such reformation, but he is not limited to making such proof by any particular kind or character of evidence. p. 445.

From Ohio Circuit Court; *Samuel B. Welts*, Special Judge.

Harmon v. Pohle—55 Ind. App. 439.

Action by William Pohle against Leonard Harmon and others. From a judgment for plaintiff, the defendants appeal. *Reversed.*

Givan & Givan, Thomas S. Cravens and Llewellyn E. Davies, for appellants.

N. Cornet and McMullen & McMullens, for appellee.

FELT, J.—This is the second appeal in this case. See *Harmon v. Pohle* (1910), 46 Ind. App. 369, 92 N. E. 119.

Appellants have assigned as error the overruling of

1. the demurrer to the complaint. The sufficiency of the complaint was determined by the former decision. Appellants admit this but claim the complaint is insufficient unless aided by the lease, to which reference is made, and contend that the lease is not properly made a part of the complaint; that the court in the former opinion did not pass upon the latter question and for that reason this court should now consider the sufficiency of the complaint as against such objection. In the former opinion the court said: "The sufficiency of this pleading primarily depends upon the construction of the lease made by appellee to appellant," and then set out the portions of the lease pertinent to the questions under consideration, and held the first paragraph good for the recovery of the possession of the real estate therein described and also held the second paragraph sufficient as an action for the recovery of damages on account of a breach of the contract. The question then determined and now sought to be again presented, is the sufficiency of the complaint. The question as to whether the lease was properly a part of the complaint was a minor and subsidiary question and was necessarily determined when the complaint was considered and held good, for the discussion related to the provisions of the lease, and it is not claimed that the complaint has been amended. A former judgment on appeal rules the case on a subsequent appeal involving the same questions.

It has been held that where there are incidental questions which were not considered and decided on a former appeal,

the court on a subsequent appeal of the same case is

2. not bound to consider the former decision as conclusively adjudicating such questions, but where such subsidiary or incidental questions are necessarily involved, and where the decision announced could not have been reached without either expressly or impliedly deciding such questions, the judgment on appeal rules the case throughout all subsequent stages either in the *nisi prius* courts or courts of appellate jurisdiction. *Forgerson v. Smith* (1885), 104 Ind. 246, 3 N. E. 866; *Lillie v. Trentman* (1891), 130 Ind. 16, 29 N. E. 405; *Board, etc. v. Bonebrake* (1896), 146 Ind. 311, 45 N. E. 470; *James v. Lake Erie, etc., R. Co.* (1897), 148 Ind. 615, 617, 48 N. E. 222; *Foudray v. Foudray* (1913), 54 Ind. App. 164, 101 N. E. 679. When the court held the complaint good and considered the provisions of the lease, by necessary implication, it held the lease to be a part of the complaint and that decision is the law of the case as to the sufficiency of the complaint, whether properly so held or not.

Appellee insists that appellants have not complied with the rules of this court in the preparation of their briefs and that no questions are presented for decision.

3. The briefs are justly subject to some criticism, but they evidence a good faith effort to comply with the rules of the court and we shall therefore consider and decide the questions that may be definitely ascertained by a fair and reasonable construction thereof.

A new trial was asked on the ground that the court committed harmful error in the giving of certain instructions.

Some questions are again discussed, that were deter-

4. mined by the former decision. Appellants then contended that the lease only required them to clear fifteen acres every two years and this court in the former decision sustained appellee's contention that the lease required

appellants to clear fifteen acres each year. We think the court correctly construed the lease, but even if our view differed from that expressed by the former opinion that decision on the point would control.

The lease in question demised to appellants "the timber land, except the oak groves on the top of the ridges", of certain lands in Dearborn County, Indiana, particu-

5. larly described as containing in all about 173 acres, "until all the said timber land is clear". The lessees agreed "to build a tobacco barn on some part of the above described real estate owned by said lessor". The lease did not cover all of the 173 acres described therein and did not require the barn to be built on the particular portion of the land covered by the lease. It is claimed that instruction No. 2 given by the court of its own motion is erroneous in stating the substance of the second paragraph of complaint to be "that the lease as set out therein should be changed so that the defendants were to build a barn on plaintiff's real estate so leased to defendants," in a particular manner, whereas the second paragraph of complaint charges "that plaintiff and defendants after the execution of said lease further agreed that said written lease should be further changed in that the barn provided for in said written lease should be built" according to certain specifications, the particulars of which are alleged and did not authorize the court to instruct the jury that it proceeded on the theory that the alleged changes required the barn to be built on the particular part of the land covered by the lease, or at any different location than that specified in the original writing. The instruction did not clearly state the issue presented by the second paragraph of the complaint and inferentially injected into the complaint the idea that the alleged changes required the barn to be built on the portion of the farm covered by the lease, whereas the alleged changes in the lease, as averred, did not refer to a change in the location of the barn but to the kind of a barn that should be built. Instruction No. 9

is criticised for the same reason, as informing the jury that the material allegation of the second paragraph of the complaint was that defendants agreed with the plaintiff "to build a barn on said leased premises", etc. These instructions were misleading and may have confused the jury as to the issue tendered by the second paragraph of complaint.

The third instruction told the jury "that the defendant's answer in general denial * * * places upon him the burden of proving every material allegation of his complaint." In all probability this was an inadvertent

6. use of the pronoun "him" instead of the word "plaintiff". The instruction is erroneous, but whether the giving of it was or was not reversible error need not be determined because of other erroneous instructions which require the reversal of the judgment.

Instruction No. 4 told the jury that the substance of defendant's answer of counterclaim, by the terms of the lease made a part thereof, was "that defendants were only

7. to clear up ready for cultivation 15 acres of plaintiff's real estate every two years from the first day of March, 1905; instead of 15 acres every year as alleged by the plaintiff." It is charged in the answer that the actual agreement of the parties was as above stated, fifteen acres every two years, and that by mutual mistake of the parties and mistake of the scrivener who wrote the lease, it does not express the real agreement. The provisions which appellants claim constitute the real agreement of the parties are alleged and the prayer is that the lease be reformed to express such meaning. The instruction as given, indicates that the appellants were relying on the lease as written, whereas the real issue presented by the answer was that of the reformation of the lease to make it express what appellants' claim was the actual contract, though not expressed by the written instrument.

Instruction No. 13 given by the court is justly criticised as being indefinite and confusing as to the measure and

clements of certain values the jury was informed might be recovered by plaintiff under certain conditions.

Objection is also made to instruction No. 15 on several grounds. The instruction is long and refers to the lease as written, and as it would be if reformed as prayed

8. for in appellants' counterclaim and then says: "this counterclaim is in the nature of a cross-complaint, and places the burden on the defendants of proving the same by a fair preponderance of the evidence and this evidence must be of the most persuasive character. Reformation is a much more delicate remedy than a rescission. Hence in order to justify a jury in finding that the contract was a mutual mistake it is necessary that they should determine that the mistake should have been mutual." There was no question of rescission of contract presented by the issues, and if there had been the court would not have been justified in suggesting to the jurors a comparison of the two questions, of reformation and rescission, and leaving them to speculate as to the distinction they should make in this particular instance. A proposition may be correct in a sense and yet be inapplicable to the issues and misleading to the jury. Again

9. the suggestion that appellants not only had the burden of proving the counterclaim by a fair preponderance of the evidence, but that "this evidence must be of the most persuasive character," was erroneous for it required appellants to prove the counterclaim by a rare and peculiar kind of evidence.

Where parties have reduced their agreement to writing, the law presumes that such writing fully expresses the terms of their agreement. Where one of the parties seeks

10. to reform such instrument, he must show that the real contract is not expressed by it and that the failure of the instrument to express the true agreement is due to the mutual mistake of fact, or to some other reason recognized by the law as sufficient to warrant such relief.

The party seeking reformation of a written instrument

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must give clear and satisfactory proof of the provisions of the actual contract between the parties and of the mutual mistake of fact, or other ground, authorizing such reformation, but in doing so he is not limited to any particular kind or character of evidence. It need not be of "the most persuasive character," but to authorize the granting of such relief the facts essential thereto must be clearly and fully established by a fair preponderance of the evidence. *Koons v. Blanton* (1892), 129 Ind. 383, 27 N. E. 334; *Heavenridge v. Mondy* (1875), 49 Ind. 434; *Baker v. Pyatt* (1886), 108 Ind. 61, 67, 9 N. E. 112; *Phenix Ins. Co. v. Rogers* (1894), 11 Ind. App. 72, 81, 38 N. E. 865; *Citizens Nat. Bank v. Judy* (1896), 146 Ind. 322, 329, 43 N. E. 259; 34 Cyc. 920.

Some of the other questions suggested are not properly presented by the briefs and others are not likely to arise at another trial of the case. The instructions given were in many respects misleading and confusing. The errors are of such a character that we can not say they were not harmful to appellants.

For the reasons already stated, the judgment is reversed with instructions to sustain appellants' motion for a new trial and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 103 N. E. 1087. As to causes and proceedings for reformation of instruments, see 65 Am. St. 481; 117 Am. St. 227. As to the sufficiency of evidence to warrant the reformation of an instrument on the ground of mutual mistake, see 19 Ann. Cas. 343. See, also, under (1) 3 Cyc. 401; (2) 3 Cyc. 395; (3) 2 Cyc. Anno. 1013; (4) 3 Cyc. 397; (5) 38 Cyc. 1611; (6) 3 Cyc. 223; (7) 38 Cyc. 1610, 1611; (8) 38 Cyc. 1614; (9) 38 Cyc. 1750, 1755; (10) 34 Cyc. 979, 980, 984.

Board, etc. v. Hutson—55 Ind. App. 447.

BOARD OF COMMISSIONERS OF THE COUNTY OF
MARION v. HUTSON.

[No. 8,112. Filed January 30, 1914.]

1. **APPEAL.**—*Record.—Failure to Show Judgment.—Dismissal.*—

Where the record on appeal does not disclose that any judgment was rendered by the trial court, the appeal is unfounded and a dismissal is required. p. 447.

From Superior Court of Marion County; *Vinson Carter*, Judge.

Action by Harmon L. Hutson against the Board of Commissioners of the County of Marion. Defendant appeals. *Appeal dismissed.*

Edward B. Raub, for appellant.

Charles F. Remy and *James M. Berryhill*, for appellee.

HOTTEL, J.—Appellee brought this action against appellant to recover on an oral contract alleged to have been entered into between appellant and appellee whereby the latter was employed to sprinkle with oil a portion of a certain free gravel road in Marion County at an agreed price of \$1,039.50. There was a trial by the court and a special finding of facts and conclusions of law in favor of appellee. The

errors assigned and relied on for reversal call in ques-

1. tion the sufficiency of the complaint and the conclusion of law stated on the facts found, but an examination of the record fails to disclose any final judgment rendered. The transcript shows the finding of facts and conclusions of law in appellee's favor but no judgment rendered thereon.

There being no judgment to appeal from it follows that the appeal should be dismissed. §§670, 671, 672 Burns 1908, §§631, 632, 633 R. S. 1881, and authorities cited thereunder.

Appeal dismissed.

NOTE.—Reported in 103 N. E. 1090. See, also, 2 Cyc. 1029.

DITTMAN ET AL. v. KELLER ET AL.

[No. 8,227. Filed February 3, 1914.]

1. **MINES AND MINERALS.—Oil and Gas Leases.—Construction.**—A lease of lands for the “sole and only purpose of operating for oil, or gas and mineral” for the period of five years, and as much longer as the premises should be operated for oil and gas, and providing that “if operations for oil or gas cease for a period of sixty days”, the lease shall be null and void at lessor’s option, is unambiguous and is not subject to the construction that it could be forfeited only at the expiration of sixty days after the full term of five years had expired. p. 451.
2. **CONTRACTS.—Leases.—Enforcement.**—An unambiguous lease or contract will be interpreted and enforced according to the plain meaning of its provisions, where nothing is shown that changes the rights of the parties as therein expressed. p. 451.
3. **MINES AND MINERALS.—Oil and Gas Leases.—Construction.—Forfeitures.**—An ordinary oil and gas lease will be construed in the light of the fact that its central purpose is that of development, and where forfeiture is provided in case of a failure to develop as stipulated in the lease, such forfeiture will be declared and enforced where the party seeking the relief brings himself within the provisions authorizing same. p. 451.
4. **MINES AND MINERALS.—Oil and Gas Leases.—Construction.**—Under an oil and gas lease providing that should “the party of the second part feel justified in drilling more than one well, then the parties of the first part are to share equally in all expenses pertaining to the drilling * * * of the same”, and that “the price of drilling additional wells shall be at the customary market price for drilling wells in the district”, the lessors were not required to tender payment of one-half the cost of a second well as a condition precedent to the right to forfeit the lease for failure to operate for a period of sixty days as therein provided. p. 451.
5. **APPEAL.—Review.—Evidence.—Findings.**—Where there is evidence tending to support the finding of the court, the judgment will not be reversed for insufficiency of evidence. p. 452.

From Knox Circuit Court; *Orlando H. Cobb*, Judge.

Action by John H. Keller and another against V. W. Dittman and another. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

Dittman v. Keller—55 Ind. App. 448.

W. A. Cullop and John Downey, for appellants.

E. B. Green and Theodore G. Risley, for appellees.

FELT, J.—On August 17, 1906, appellees executed to appellants a contract, or lease of certain lands for the period of five years, and as much longer as the premises should be operated for oil or gas, for the “sole and only purpose of operating for oil, or gas and mineral, and of laying pipe lines and building of tanks, stations thereon to take care of said products.” The lease contains the following provisions: “It is agreed that the parties of the first part shall receive one-half profits from all wells, the first well to be drilled at the expense of the parties of the second part, and should party of the second part feel justified in drilling more than one well, then the parties of the first part are to share equally in all expenses, pertaining to drilling and taking care of the same; and should no oil or gas be found, then the parties of the second part have the right to remove all casing, machinery and fixtures used in the drilling of the first well; the casing, machinery and fixtures of the first well to remain the property of the parties of the second part. It is further agreed that in case the parties of the second part elect to drill more than one well, then the price of drilling additional wells shall be at the customary market price for drilling wells in the district or field in which the land is situated * * *. The parties of the second part agree to commence operations on or before the 20th day of Sept. A. D., 1906. It is further agreed, that if operations for oil or gas cease for a period of sixty days, this lease shall become null and void at the option of the parties of the first part.”

The complaint is in one paragraph, and in substance shows the execution of the lease, which is set out in terms; that in pursuance thereof defendants (appellants) did commence operations on the leased premises and drilled thereon one well to a sufficient depth to produce oil; that on August

30, 1908, the appellants wholly ceased all operations on the land for oil or gas, and wholly abandoned the well which they had drilled, and permitted large quantities of oil to flow from the well and waste for failure to plug the well; that from August 30, 1908, for a period of more than sixty days, appellants wholly ceased all operations on the land for oil and gas and, although requested by appellees, after said day and before notice of forfeiture, to resume operations, wholly refused and neglected to do so; that by reason of the cessation of all operations on the land by appellants for oil or gas for a period of more than sixty days plaintiffs elected to and did on February 12, 1909, declare the lease null and void, and served upon the appellants at West Union, West Virginia, their place of residence, a written notice to that effect (setting out notice); that appellants are still claiming that the agreement has not been forfeited, and have left some of their machinery and fixtures on the premises, and, thereby interfere with, and prevent appellees from leasing and contracting the land to other parties, to be explored for oil and gas, to the great inconvenience and damage of the appellees; that appellees have always been ready, willing and able to comply with the terms and conditions of the agreement on their part to be kept and performed, of which fact appellants at all times had notice. Prayer that said contract be declared null and void; that the same, and the record thereof in the recorder's office of Knox County, be canceled; that appellants remove from the land all their machinery, etc., and for all other proper relief.

From a judgment for appellees in accordance with the prayer of the complaint, the appellants appeal to this court and assign as error the overruling of the demurrer to the complaint for alleged insufficiency of facts to state a cause of action, and the overruling of their motion for a new trial, which was asked on the ground that the decision of the court is not sustained by sufficient evidence and is contrary to law.

Appellants contend that as forfeitures are not favored in law, the lease in question could not be forfeited until sixty days had expired after the full term of five

1. years had run according to the provisions of the lease.

The instrument in question is not ambiguous and will not bear the construction appellants seek to place upon it.

An unambiguous lease or contract will be interpreted

2. and enforced according to the plain meaning of its provisions where nothing is shown that changes the rights of the parties as therein expressed. It has been held many times that development is the central purpose

3. of the ordinary oil and gas lease and that such instruments will be construed in the light of such purpose, and where provision is made for forfeiture in case of the failure to develop as provided in the lease, a forfeiture will be declared and enforced where the parties seeking such relief bring themselves within the provisions authorizing the forfeiture. *Risch v. Burch* (1911), 175 Ind. 621, 627, 95 N. E. 123; *Dill v. Frazee* (1907), 169 Ind. 53, 55, 79 N. E. 971; *Gadbury v. Ohio, etc., Gas Co.* (1904), 162 Ind. 9, 16, 67 N. E. 259, 62 L. R. A. 895.

The other contention that the lease requires the lessors, appellees, to tender payment of one-half of the cost of a second well as a condition precedent to the right to

4. forfeit the lease for failure to operate for sixty days is equally untenable. The contract expressly provides that the drilling of a second well on the premises depends upon the lessees feeling justified in so doing and that in case a second well is drilled, the expense of so doing is to be shared equally by the lessees and lessors. There is no suggestion that a tender should be made of the lessors' share of the expense before the work is begun. The amount of the expense is indefinite, and the lessors' liability, by the terms of the contract, would arise only when the lessees proceeded to drill a second well, and could be enforced only after the

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“customary and market price for drilling” such well was ascertained.

The pleadings presented the issue of the forfeiture of the lease. The evidence on the question is conflicting, but there is evidence tending to support the finding of the court

5. and we cannot therefore reverse the judgment for insufficiency of the evidence. The court did not err in the overruling of the demurrer to the complaint or the motion for a new trial. Judgment affirmed.

NOTE.—Reported in 104 N. E. 40. As to reluctance of courts to enforce forfeitures in cases of leases, see 26 Am. St. 911. As to covenants in mining leases for the diligent prosecution of the work, see 2 Ann. Cas. 446; 20 Ann. Cas. 1165. See, also, under (1) 27 Cyc. 722; (2) 9 Cyc. 577, 578; (3) 27 Cyc. 735, 736; (4) 27 Cyc. 734; (5) 3 Cyc. 360.

THARP v. UPDIKE ET AL.

[No. 7,894. Filed October 17, 1913. Rehearing denied February 3, 1914.]

1. HUSBAND AND WIFE.—*Conveyances.—Estates Created.*—A conveyance of land to a husband and wife creates a tenancy by entirety and the survivor takes the whole by his right of survivorship. p. 454.
2. TRUSTS.—*Resulting Trusts.—Evidence.*—Evidence merely showing that some of the money inherited by plaintiff's mother was by the latter applied on the payment of the purchase price of land conveyed to her and her husband jointly, but not showing the amount, and also showing that money belonging to the husband was applied to the payment of the purchase price, and failing to show that the title was taken in their joint names without the consent of plaintiff's mother, or that there was any agreement entered into at the time by which the title was to be held in trust for plaintiff's mother, was not sufficient to show an implied or resulting trust under the provisions of §§4017, 4019 Burns 1908, §§2974, 2976 R. S. 1881, relating to the establishment of such trusts. p. 454.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Mina E. Tharp against Benjamin F. Updike

and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

J. W. Moffett and C. W. Watkins, for appellant.

Fred H. Bowers and Milo N. Feightner, for appellees.

LAIRY, J.—Appellees, John Updike, Levi H. Updike and Ollie M. Sprinkle are the children of appellee, Benjamin F. Updike and his deceased wife Nancy J. Updike. The maiden name of Nancy J. Updike was Hoover; and, prior to her marriage to Updike in 1880, she had been married to a man named Landis by whom she had two children, Mina Tharp, the appellant and a Mrs. Sours who originally joined in the complaint but afterward dismissed. In 1891, Benjamin F. Updike and his wife Nancy J. purchased a farm of eighty acres in Huntington County, taking the title thereto in their joint names. They lived on this land as their home and continued to own it until the death of the wife which occurred a short time before the commencement of this suit. Soon after her mother's death, appellant instituted this suit by filing a complaint in two paragraphs the first of which alleged that plaintiff and the defendants were the owners of the eighty-acre tract of land as tenants in common and prayed partition. The second paragraph described the same eighty-acre tract and alleges that it was bought and paid for with money belonging to Nancy J. Updike which she secured upon the settlement of the estate of her father, John Hoover. It is further alleged in this paragraph that at the time of the purchase, it was agreed that the title should be taken in the names of Benjamin F. Updike and Nancy J. Updike and that they should hold the land in trust for Nancy J. Updike and not as tenants by the entireties. The prayer was for partition. There was a trial by the court and a finding and judgment for the defendants.

The action of the trial court in overruling appellant's motion for a new trial is assigned as error. The only question presented and argued is the sufficiency of the evidence

to sustain the finding. A conveyance of land to a husband and wife creates a tenancy by entireties and the sur-

1. vivor takes the whole by his right of survivorship.

Davis v. Clark (1866), 26 Ind. 424, 89 Am. Dec. 471.

It is not claimed that the evidence shows an express trust in the real estate in controversy in favor of Nancy

2. J. Updike, and the facts proved are not sufficient, under the statute of this State to show an implied or resulting trust. Section 4017 Burns 1908, §2974 R. S. 1881, reads as follows: "When a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections." The next section does not apply to the facts of this case, but §4019 Burns 1908, §2976 R. S. 1881, reads as follows: "The provisions of the section next before the last shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid; or where such alienee, in violation of some trust, shall have purchased the land with moneys not his own; or where it shall be made to appear that, by agreement and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase-money or some part thereof."

There is evidence in this case to show that some of the money received by Nancy J. Updike from her father's estate was applied to the purchase price of this land, but the amount so applied is not shown. There is also evidence from which the court may have found that a considerable amount of money belonging to the husband was applied to the payment of the purchase price. There is no evidence that the title was placed in the joint names of Benjamin F. Updike and his wife without the consent of the wife, and there is

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no evidence that there was any agreement entered into at the time of the conveyance by the terms of which the title was to be held in trust for Nancy J. Updike.

The evidence is clearly sufficient to sustain the decision of the trial court and appellant's motion for a new trial was properly overruled. Judgment affirmed.

NOTE.—Reported in 102 N. E. 855. As to tenancy by entirety, see 18 Am. Dec. 377; 33 Am. Rep. 269; 30 L. R. A. 306. As to the sufficiency of a deed to create a tenancy by entirety, see Ann. Cas. 1912 O 927. See, also, under (1) 21 Cyc. 1195, 1198; (2) 39 Cyc. 160.

HARTZLER ET AL. v. THE GOSHEN CHURN AND LADDER COMPANY.

[No. 8,184. Filed February 4, 1914.]

1. **TRADE-MARKS AND TRADE-NAMES.**—*“Unfair Competition”*.—“Unfair competition” is the passing off, or attempt to do so, upon the public, of the goods or business of one person as and for the goods or business of another, by means of either an implied or express representation to that effect, and any conduct, the natural and probable tendency and effect of which is to thus deceive the public, constitutes actionable unfair competition. p. 464.
2. **TRADE-MARKS AND TRADE-NAMES.**—*Unfair Competition.—Grounds of Relief.*—The basis of relief against unfair competition is found in the fact that one who builds a good will and reputation for his goods or business has thereby acquired a property right to the benefits of which he is entitled, and which, like other property, is protected against invasion. p. 464.
3. **TRADE-MARKS AND TRADE-NAMES.** — *“Trade-Names”*. — “Trade-names” are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or a particular class of goods, but they are not technically trade-marks because not capable of exclusive appropriation as trade-marks, though they may or may not be exclusive. p. 464.
4. **TRADE-MARKS AND TRADE-NAMES.**—*Exclusive Trade-Names.*—Exclusive trade-names are protected very much upon the same principles as trade-marks, and the rules governing the latter are applicable in determining what may be an exclusive trade-name. p. 465.

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5. **TRADE-MARKS AND TRADE-NAMES.—*Nonexclusive Trade-Names.***—Nonexclusive trade-names are names that are *publici juris* in their primary sense, but which in a secondary sense have become indicative of the goods or business of a particular trader. p. 465.
6. **TRADE-MARKS AND TRADE-NAMES.—*Acquiring Trade-Names.***—Trade-names are acquired by adoption and user and belong to him who first used and gave them value. p. 465.
7. **TRADE-MARKS AND TRADE-NAMES.—*Unfair Competition.—Elements.***—Unfair competition is established by a showing that the defendant's conduct has either actually resulted, or will naturally and probably result, in deception and confusion whereby the goods of defendant will be purchased in the belief that they are those of the plaintiff. p. 465.
8. **TRADE-MARKS AND TRADE-NAMES.—*Unfair Competition.***—Unfair competition is always a question of fact as to whether defendant is by his conduct passing off his goods or his business as that of the plaintiff. p. 465.
9. **TRADE-MARKS AND TRADE-NAMES.—*Unfair Competition.—Intent.***—An actual fraudulent intent need not be shown to make a case of unfair competition, especially where only preventive relief is sought. p. 466.
10. **TRADE-MARKS AND TRADE-NAMES.—*Unfair Competition.***—A dealer coming into a field already occupied by a rival of established reputation must do nothing which will unnecessarily create or increase confusion between his goods or business and the goods or business of his rival. p. 466.
11. **TRADE-MARKS AND TRADE-NAMES.—*Unfair Competition.—Descriptive and Generic Names.***—Where descriptive and generic names by long usage have become identified in the minds of the public with the goods or business of a particular trader, their use by a subsequent trader in connection with similar goods or business in such manner as to deceive the public and pass off his goods or business for that of his rival, constitutes unfair competition. p. 466.
12. **TRADE-MARKS AND TRADE-NAMES.—*Unfair Competition.—Corporate Names.***—A corporate charter grants no immunity in the use of a deceptive name; hence the use of corporate names may be enjoined upon the general principles of trade-marks and unfair competition, where they are sufficiently similar to names in use by prior traders to produce confusion and injury. p. 467.
13. **TRADE-MARKS AND TRADE-NAMES.—*Unfair Competition.***—The use of circulars and advertisements calculated to deceive the public and pass off defendant's goods or business as that of the plaintiff constitutes unfair competition and will be enjoined. p. 467.

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14. **TRADE-MARKS AND TRADE-NAMES.—Unfair Competition.—Actions.—Complaint.—Sufficiency.**—In an action for damages and injunctive relief on account of unfair competition, a complaint alleging facts showing a scheme to cause the public to believe that ladders manufactured by defendant were those of plaintiff's manufacture, by using the words "security ladder", which was the established trade-name for plaintiff's goods, as a part of its corporate name, "The Security Ladder Co.", which it placed upon its goods and advertising matter, was sufficient to show a conspiracy to adopt plaintiff's trade-name and to pass off the goods of defendant as the goods of plaintiff. p. 467.

15. **TRADE-MARKS AND TRADE-NAMES.—Unfair Competition.—Evidence.—Sufficiency.—Fraud.**—In an action to enjoin unfair competition on the ground that defendant was causing the public to believe that ladders of its manufacture were those of the plaintiff, evidence showing that plaintiff had used the name "Security" as a trade-name applied to a certain make of ladder, and had featured such ladder and name prominently in its advertising, that defendant's advertising matter also featured the name "Security" as its corporate name, and much of it was so similar in form to that sent out by the plaintiff as to actually mislead and deceive certain of plaintiff's customers, and that the name "Security" as adopted by defendant with full knowledge of the use to which it had been put by plaintiff, was sufficient to warrant the presumption of fraud in the selection of defendant's corporate name. pp. 468, 470.

16. **EVIDENCE.—Intent.—Presumptions.**—A man is presumed to intend the consequences of his own acts. p. 469.

17. **TRADE-MARKS AND TRADE-NAMES.—Unfair Competition.—Relief.—Injunction and Damages.**—Where a trade-name is innocently or ignorantly taken and used in a way which amounts to unfair competition, injunction is ordinarily the relief granted; but where such trade-name is so taken and used with knowledge of its prior use, an action at law for damages may be maintained. p. 470.

18. **CORPORATIONS.—Officers and Directors.—Liability.**—Officers or directors of a corporation may be personally liable for acts which are also torts of the corporation. p. 471.

19. **CORPORATIONS.—Liability of Stockholders.—Torts of Corporation.**—A stockholder, who is not an officer of the corporation and in no way connected with the management of its business, cannot, as a general rule, be held personally liable for its torts. p. 471.

From Elkhart Superior Court; *Vernon W. VanFleet*, Judge.

Hartzler v. Goshen, etc., Ladder Co.—55 Ind. App. 455.

Action by The Goshen Churn and Ladder Company against Aaron Hartzler and others. From a judgment for plaintiff, the defendants appeal. *Affirmed* in part, and *reversed* in part.

Lou W. Vail, for appellants.

E. A. Dausman and *P. L. Turner*, for appellee.

IBACH, J.—This suit was brought by appellee against the individual defendants and The Security Ladder Company, a corporation, to recover damages and to enjoin them from interfering with appellee's business, upon the theory of unfair competition. The averments of the complaint are the following: "That the plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of Indiana, and for eight years last past has been, and now is, engaged in the business of manufacturing and selling churns, ladders, and lawn swings. That the plaintiff's home office, its factory and its principal and only place of business now is, and for the eight years last past has been continuously, at the city of Goshen, in the county and State aforesaid. That the plaintiff for the eight years last past has manufactured and sold, and is now manufacturing and selling, a certain step ladder, under, by and in the trade-name of the 'Security Ladder'; that during the eight years last past the plaintiff has applied the said trade-name to said ladder and has stamped said trade-name thereon; that the plaintiff has expended large sums of money and devoted much time and effort in introducing and placing on the market said Security Ladder under said trade-name; that by extensive advertising and continuous effort the plaintiff has built up a good trade in said Security Ladder; that the plaintiff has made a specialty of said Security Ladder and the manufacture and sale thereof constitutes a prominent feature of plaintiff's business; that said Security Ladders have been and now are extensively advertised throughout the country by jobbers and retailers who pur-

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chase them from the plaintiff; that said Security Ladders have become widely known to the trade and to consumers by the name of the Security Ladder and have attained a high reputation for strength, durability, and good qualities generally; and that the manufacture and extensive sale of said ladders is a source of profit to the plaintiff. That the defendant The Security Ladder Company is a corporation, organized and existing under and by virtue of the laws of the State of Indiana, and has its home office and its principal and only place of business in the city of Goshen, in the county and State aforesaid. That the said defendant corporation is engaged in the manufacture and sale of step ladders similar in design and construction to plaintiff's said ladders. That the individual defendants Aaron Hartzler, Samuel F. Poorman, Arthur E. Brownell, George Bosse, Harvey D. Rough, William O. Vallette, George A. Riley and Lou W. Vail are the stockholders and officers of the defendant The Security Ladder Company. That the defendant Aaron Hartzler was one of the original incorporating members of the plaintiff corporation, The Goshen Churn and Ladder Company, and was a stockholder in and was the secretary and treasurer of the said The Goshen Churn and Ladder Company from the organization thereof to November 16, 1909; that on November 16, 1909, said Hartzler sold his interest in the said The Goshen Churn and Ladder Company to his associate stockholders therein; and that thereupon he promoted the organization of the defendant corporation, The Security Ladder Company; that the defendants Samuel F. Poorman, Arthur E. Brownell and Harvey D. Rough, on and prior to November 16, 1909, were in the employ of the plaintiff in the capacity of traveling salesmen; that the defendant George Bosse, on and prior to November 16, 1909, was in the employ of the plaintiff in the capacity of foreman of one of the departments, and each and all of the individual defendants, at the time of the organization of the defendant corporation, well knew

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the use the plaintiff had made and was then making of the name 'Security' in connection with the advertisement and sale of its ladders, and well knew the plaintiff's interest in said name. That the said individual defendants, in disregard of the plaintiff's rights, conspired to create a corporation which should have a pretended color of right to use the name 'Security Ladder' for the purpose of deceiving the public into the belief that they were the original makers or the manufacturing successors of the original makers of such ladders, and thus create, by means of the deception, an unfair and tricky competition in trade with the plaintiff. That the defendants have prominently displayed the plaintiff's corporate name in their advertising literature in connection with the corporate name of the defendant corporation, concerning the manufacture and sale of ladders; that the defendants in their advertising literature announced to the public the fact that the defendant Hartzler was formerly with the plaintiff in the capacity of secretary and treasurer, and that the defendants Poorman, Rough, and Brownell were formerly with the plaintiff in the capacity of traveling salesmen and would continue to travel the same territory they formerly covered for The Goshen Churn and Ladder Company; that in said advertising matter and literature the plaintiff's corporate name is prominently displayed in connection with the corporate name of the defendant company, and in connection with the names of the individual defendants as dealers in ladders, and in connection with the name of the defendant Hartzler as plaintiff's former secretary and treasurer, and in connection with the names of the defendants, Poorman, Rough and Brownell as plaintiff's former traveling salesmen; that said advertising matter is well calculated to deceive ordinary purchasers of ladders into the belief that the defendants are carrying on the business of the plaintiff—their former employer—or in some way connected with it; and that the defendants have been selling their goods, the

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ladders herein referred to, from the plaintiff's catalogues and photographs. That the name of the defendant corporation was unlawfully and wrongfully selected specifically for the benefit that would accrue from the use of the name 'Security Ladder' and for the purpose thereby unnecessarily to create unfair competition. That the name of the defendant corporation was wrongfully and unlawfully selected in imitation of plaintiff's trade-name 'Security Ladder' for the fraudulent purpose of deceiving the public and appropriating plaintiff's good will and reputation. That by reason of the defendant's literature, advertising matter and correspondence being subscribed by the corporate name of the defendant corporation, 'The Security Ladder Company', purchasers, dealers, and users are led to believe and will be led to believe, are induced to buy and will be induced to buy from the defendant corporation in the belief that they are buying plaintiff's goods, as and for the goods made by the plaintiff; and that purchasers of ladders, while intending to buy of the plaintiff, are led to purchase and will continue to be led to purchase, ladders of the defendant corporation's manufacture, thereby diminishing plaintiff's profits, to the great and irreparable injury of the plaintiff. That by reason of the fact that the ladders manufactured and to be manufactured by the defendants are similar in size and design to the ladders manufactured by the plaintiff, the use of the name of the defendant corporation, in any manner therewith, whether stamped thereon or otherwise associated with said ladders, tends to mislead and confuse dealers, purchasers and users of ladders as to the origin of the goods and enables the defendants to sell their goods as and for the goods of the plaintiff; and that the defendants are thus wrongfully appropriating the benefits of the corporation acquired by the plaintiff's goods. That the defendants, by wrongfully selecting, adopting and appropriating the plaintiff's said trade-name as and for the corporate name of the defendant cor-

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poration, are enabled to palm off their goods as and for the goods of the plaintiff; and that the defendants are thereby palming off their goods as and for the goods of the plaintiff. That the plaintiff has the exclusive right to the use of said trade-name 'Security' as applied to ladders, and to the trade-name 'Security Ladder' especially as against the defendants' wrongful and misleading use of said names as aforesaid; and that the use of the name 'The Security Ladder Company' or 'Security Ladder Company' as and for the name of the defendant corporation is an unwarranted interference with the trade and good will and reputation of the plaintiff."

It is also alleged that in the manner and form aforesaid, the defendants have pirated the plaintiff's trade-name and business; are attempting to wrongfully take and appropriate the plaintiff's business prestige and reputation; are stealing the business, good will, profits and emoluments accruing to plaintiff by reason of its long term of years in selling and advertising Security ladders; and are endeavoring to sell their ladders as plaintiff's, to plaintiff's damage in the sum of \$10,000. That the defendants threaten to, and will, unless restrained by this court, continue to infringe on plaintiff's rights as aforesaid, and to stamp the name "The Security Ladder Company" or the name "Security Ladder," or the name "Security" on their ladders, to the irreparable injury of the plaintiff, for which it can not be compensated in damages. Wherefore, the plaintiff prays judgment for \$10,000, and that defendants, all and each of them be perpetually enjoined from using the name "The Security Ladder Company", or the name "Security Ladder Company" or the name "Security", or any name or names substantially identical therewith for their corporate name; or in connection with the business of the manufacture and sale of ladders; and from stamping ladders of their manufacture with such names; and from interfering with the paramount right of plaintiff to such names in connection

with the manufacture and sale of ladders; and from representing that goods manufactured by them are manufactured by plaintiff; and from using the plaintiff's corporate name in their advertising in any manner calculated to deceive ordinary purchasers of ladders as to the origin of defendants' goods; and from advertising the fact that they or any of them were formerly with the plaintiff, in any manner that tends to injure the plaintiff, and for all other proper relief.

Demurrers to this complaint by each defendant were overruled, and the issues closed by answers in general denial. The cause was tried by the court, which found the complaint true and proven, that the defendants in adopting and using the corporate name of the Security Ladder Company and in adopting and using in its corporate name the word "Security" perpetrated a fraud upon the plaintiff, that the use of such corporate name and such word was wrongful to the plaintiff, and caused it to be damaged in the sum of \$500, that the defendants should be enjoined, substantially in accordance with the prayer of the complaint, and rendered judgment in conformity to the findings.

Appellants separately assign that the complaint does not state facts sufficient to constitute a cause of action against appellants and each of them, that the court erred in overruling the demurrer of appellants and each of them to the complaint, and that the court erred in overruling the separate and several motions for new trial of each appellant, and appellant's joint motion for new trial.

The subject of unfair business competition has not been much considered by our courts. Indeed, we believe that there is but one case reported in this State, that of *Computing Cheese Cutter Co. v. Dunn* (1909), 45 Ind. App. 20, 88 N. E. 93, which deals exclusively with the question, though there are some older trade-mark cases. We therefore feel justified in referring at some length to the general principles of the law of unfair competition as deduced

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from cases in other jurisdictions, and collected in text-books, and we find that in the following excerpts from the article in Cyc. on trade-marks, trade-names, and unfair competition, the rules applicable to the present case are stated in language probably more concise and accurate than our own would be.

“Unfair competition consists in passing off or attempting to pass off, upon the public, the goods or business of one person as and for the goods or business of another.

1. It consists essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation to that effect. And it may be stated broadly that any conduct, the natural and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for that of another, constitutes actionable unfair competition. The definition is comprehensive enough to reach every possible means of effecting the result.” 38 Cyc. 756.

“Relief against unfair competition is properly afforded upon the ground that one who has built up a good will and reputation for his goods or business is entitled to all

2. the benefits therefrom. Such good will is property, and like other property is protected against invasion. The deception of the public injures the proprietor of the business by diverting his customers and depriving him of sales which he otherwise would have made.” 38 Cyc. 760.

“Trade-names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a busi-

3. ness is located, or of a class of goods, but which are not technical trade-marks either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation by any one as trade-marks. Such trade-names may, or may not, be exclusive.

Exclusive trade-names are protected very much upon the

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same principles as trade-marks, and the same rules

4. that govern trade-marks are applied in determining what may be an exclusive trade-name. Nonexclusive trade-names are names that are *publici juris* in their
5. primary sense, but which in a secondary sense have come to be understood as indicating the goods or business of a particular trader. Trade-names are ac-
6. quired by adoption and user, and belong to the one who first used them and gave them a value. 38

Cyc. 764.

“In order to make out a case of unfair competition, it is not necessary to show that any person has been actually deceived by defendant’s conduct and led to purchase

7. his goods in the belief that they are the goods of plaintiff or to deal with defendant thinking that he was dealing with the plaintiff. It is sufficient to show that such deception will be the natural and probable result of defendant’s acts. But either actual or probable deception and confusion must be shown, for if there is no probability of deception, there is no unfair competition. * * * Actual instances of deception, however, afford the strongest possible proof of the deceptive tendency of defendant’s acts, and the presence or absence of such proof is often referred to as a reason for granting or withholding relief. As in the case of the infringement of another’s trade-mark, the true test of unfair competition is whether the acts of defendant are such as are calculated to deceive the ordinary buyer making his purchases under the ordinary conditions which prevail in the particular trade to which the controversy relates. This has been said to include the incautious, unwary, or ignorant purchaser, but not careless purchasers who make no examination.” 38 Cyc. 773.

- “Unfair competition is always a question of fact. The question to be determined in every case is whether or
8. not, as a matter of fact, the name or mark used by defendant has previously come to indicate and desig-

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nate plaintiff's goods, or, to state it another way, whether defendant, as a matter of fact, is by his conduct passing off his goods as plaintiff's goods, or his business as plaintiff's business." 38 Cyc. 779.

"Unfair competition involves trading upon another's reputation and good-will, and the injury is the same regardless of the intent with which it is done. Accordingly

9. the better view is that an actual fraudulent intent need not be shown where the necessary and probable tendency of defendant's conduct is to deceive the public, and pass off his goods or business as and for that of plaintiff, especially where only preventive relief against continuance of the wrong is sought or granted." 38 Cyc. 784.

"A dealer coming into a field already occupied by a rival of established reputation must do nothing which will unnecessarily create or increase confusion between his goods or business and the goods or business of his rival.

10. Owing to the nature of the goods dealt in or the common use of terms which are *publici juris*, some confusion may be inevitable. But anything done which unnecessarily increases this confusion and damage to the established trader constitutes unfair competition. The unnecessary imitation or adoption of a confusing name, label, or dress of goods constitutes unfair competition." 38 Cyc. 794.

"Even descriptive and generic names may not be used in such a manner as to pass off the goods or business of one man as and for that of another. Where such words or

11. names, by long use have become identified in the minds of the public with the goods or business of a particular trader, it is unfair competition for a subsequent trader to use them in connection with similar goods or business in such a manner as to deceive the public and pass off his goods or business for that of his rival. Accordingly the right to use generic names and descriptive terms is regulated by the courts in accordance with certain general rules

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already stated. Thus, such terms may not be used in such a manner as to cause unnecessary deception of the public and damage to the complainant. It is unnecessary for the subsequent trader to use such terms in such a manner as to give his goods the same short name, or trade-name, in the market as that of the prior trader's goods, for it is easy to use such terms in some other honestly descriptive way without injury to any right of either party." 38 Cyc. 800.

"Corporate names have frequently been enjoined upon the general principles of trade-marks and unfair competition, where they were sufficiently similar to the
12. names in use by prior traders to produce confusion and injury. A corporate charter grants no immunity in the use of a deceptive name. The same rule applies to corporate names as applies to the names of natural persons. The name may be used but only if used honestly." 38 Cyc. 819.

"Circulars, advertisements, or other announcements calculated to deceive the public and pass off defendant's goods or business as the goods or business of plaintiff constitute unfair competition and will be enjoined. The
13. imitation or copying of the complainant's circulars and advertisements is strong evidence of fraud and will be enjoined. The use of another's trade symbols in advertising matter on bill-heads, stationery, etc., may be enjoined." 38 Cyc. 846.

As was said by Judge Roby in *Computing Cheese Cutter Co. v. Dunn, supra*, "The question in every case is whether the defendant is in fact attempting to sell his goods as
14. the goods of some one else." The complaint avers facts showing that appellants were attempting to sell their goods as appellee's. The facts averred show the execution of a carefully conceived scheme, intended apparently to evade the letter of the law, but not its spirit. Instead of directly copying appellee's corporate name, or directly

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selling goods under a name similar to appellee's trade-name, appellants used the plan of making their corporate name similar to appellants' trade-name, which had been prominently advertised, and thus endeavored to gain the advantage of the use of such trade-name, while not technically using it as such. In the case of *W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.* (1905), 100 Me. 461, 62 Atl. 499, 4 L. R. A. (N. S.) 960, a corporation was enjoined from using as its corporate name the trade-name used by a firm in the same city of which the officers and stockholders of the new firm had been members. There are many other acts averred on the part of appellants, none of which perhaps, alone, would be illegal, but when combined, they are a part of a fraud upon appellee and the public, and of an illegal scheme to obtain business by representing the goods of appellants to be those of appellee. We believe also that the averments as to the individual defendants, the officers and stockholders and organizers of the appellant corporation, are sufficient as a matter of pleading to show them guilty of a conspiracy to take appellee's trade-name and pass off the goods of appellant corporation as appellee's.

The evidence as to the acts of the corporation and its officers substantially supports the allegations of the complaint. It was shown that appellee used the name

15. "Security" as a trade-name applied to a certain make of ladder, and featured this ladder and this name prominently in its advertising, and sold more of these ladders than of any other single article by it manufactured; that defendants' advertising matter also featured the name "Security" as their corporate name, and much of it was similar in form to that sent out by the old company. e. g., appellee had been accustomed to send out to the trade postcards bearing the pictures of appellants Poorman, Brownell, and Rough, its travelling salesmen, announcing their coming, and appellant corporation sent out similar cards bearing pictures of the same men; that appellant corpora-

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tion advertised the former connection of its officers with appellee, in such a manner that persons might be confused into thinking that appellant corporation was the successor of appellee. Two actual instances were shown in which orders intended for appellee were sent to appellants, those sending the orders having been misled by appellants' corporation name or advertising matter.

It must be admitted that extenuating circumstances were shown in regard to some of these things, and at one time appellants sent out a circular expressly disclaiming any connection with appellee. Naturally, when a new company whose officers were formerly officers of another company in the same line of business, begins operations in the same city, there may be some unpreventable confusion. But the one fact which overshadows all the other evidence against appellants, is that, although they had the whole English vocabulary of 450,000 words, as well as foreign languages, and the scope of inventive fancy, upon which they might draw in choosing a corporate name, yet they selected the very word which had been most prominent in the advertising of the old company. It is true that Hartzler, who selected the name, testified that he did so only because he thought it well expressed the character of ladders he intended to make, and that he had no thought of obtaining business advantage from its similarity to the trade-name of some of appellee's ladders. But he knew exactly what use had been made of the word "Security" in appellee's advertising, for he had prepared most of it. A man

16. is presumed to intend the consequences of his own acts. "Under proper circumstances the court will find in his acts evidence of an intent to defraud even in the face of his most explicit denial that he ever intended to pass off his goods as those of the complainant. 'And such intent may be and often is, made out, not from direct testimony, but as a clear inference from all the circumstances, even when defendant protests that his intention was inno-

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cent.' '' Nims, Unfair Competition §30, see, also, §§28, 34.

“No name may be chosen in naming a corporation
15. which will cause the new corporation to be passed off
as some other company already in existence, or that
will, when attached to the goods made by the new company,
pass those goods off as the goods of some other company.

* * * On the incorporators rests the affirmative duty of
differentiating the name of a new corporation from all
other names.” Nims, Unfair Competition §102.

Certainly we cannot say that Hartzler in selecting the
name “Security” fulfilled his affirmative duty on entering
a field occupied by a rival of established reputation to do
nothing to unnecessarily create or increase confusion be-
tween his goods and business and his rival’s. The circum-
stances in this case are such that we think fraud should
be presumed on the part of the one who selected the name
of appellant corporation. In cases of this kind only

17. injunctive relief is usually granted where a name is
innocently or ignorantly taken. But where with
knowledge of the facts a name is made use of in the first
instance, or where the use of the name innocently taken is
continued after knowledge of the facts, then an action at
law for damages for knowingly selling goods as the plain-
tiff’s may be maintained. *International Silver Co. v. Wm.
H. Rogers Corp.* (1904), 66 N. J. Eq. 119, 57 Atl. 1037,
2 Ann. Cas. 407.

Appellant Hartzler promoted the corporation and selected
its name, he and all but two of the individual defendants
were officers or directors of appellant corporation at the
time of the trial. Appellant corporation had continued
in the use of its corporate name after full warning from
appellee, and indeed, all of the defendants but two, from
their connection with the old company, and from other evi-
dence, must be held to have had from the first, knowledge
of that company’s right to the name “Security.” Officers

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or directors of a corporation may be personally liable
18. for acts which are also torts of the corporation. 2
Thompson, Corporations (2d ed.) §1420. Appellants
Riley and Vail, who were among the incorporators, are
shown to have been nothing but stockholders, and to
19. have severed their connection as such shortly after
the organization of the company, and before the institution of this suit. Neither of them is shown to have had anything to do with the choosing of the name, nor during their connection with the company to have had any knowledge that there was another company in Goshen manufacturing a Security ladder, or that there was a Security ladder in existence. The better rule seems to be that, although one innocently using the trade-name of another may be enjoined from its use, he is not liable in damages, so long as its use continues innocent. *W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co., supra.* Generally speaking, a stockholder, not an officer, and in no way connected with the management of the corporate business, can not be held personally liable for the torts of the corporation. 4 Thompson, Corporations (2d ed.) §4912. Further, it does not appear that these two parties Riley and Vail, were, when this suit was brought, either in a position to do the acts which they were enjoined from doing, or were threatening to do such acts, or that there was any indication that they would do so. Therefore, there was not evidence sufficient upon which to base the issuing of an injunction as against them.

We think that the court's decision as against appellants Riley and Vail is not sustained by sufficient evidence, and that the court erred in overruling their separate and several motions for new trial on that ground. As to these appellants the judgment is reversed, and the cause remanded for new trial, while as to the other appellants the judgment is affirmed, and it is ordered that they be required to pay

seven-ninths of the costs, and appellees two-ninths of the costs.

NOTE.—Reported in 104 N. E. 34. As to principles governing the use of trade-marks and trade-names, see 85 Am. St. 84. As to the personal liability of officer of corporation for personal injuries from torts in connection with its business, see 39 L. R. A. (N. S.) 901. As to whether statutory liability of stockholder or officer for debts of corporation includes liability for torts, see 22 L. R. A. (N. S.) 256. As to the use of a personal or corporate trade-name as unfair competition, see 2 Ann. Cas. 415; 16 Ann. Cas. 596. For a discussion of fraudulent intent as a necessary element of unfair competition or infringement of trade-mark, see 3 Ann. Cas. 32. See, also, under (5, 6) 38 Cyc. 765; (8) 38 Cyc. 770; (10) 38 Cyc. 758; (14) 38 Cyc. 891, 894; (15) 38 Cyc. 897; (16) 16 Cyc. 1081; (17) 38 Cyc. 891, 899; (18) 10 Cyc. 951; (19) 10 Cyc. 684.

GUYER ET AL. v. THE UNION TRUST COMPANY OF INDIANAPOLIS, TRUSTEE.

[No. 8,071. Filed February 5, 1914.]

1. APPEAL.—*Assignment of Errors.—Waiver.*—An assignment of error is waived by failure to discuss it in appellants' brief. pp. 475, 482.
2. APPEAL.—*Assignment of Errors.—Joint Assignment.—Sufficiency.*—Where only one of several defendants moved for a new trial, a joint assignment of error in the overruling of such motion presents no question. p. 482.
3. PLEADING.—*Answer.—Former Adjudication.*—In an action for the foreclosure of a mortgage, where defendants claimed that plaintiff had been given a chattel mortgage which was to be the primary security, and that because of plaintiff's negligence in recording the same the lien thereof was lost, an answer setting up the judgment in an assignment proceeding by which plaintiff was precluded from any security under such chattel mortgage, was insufficient to present an issue of former adjudication as to such question of negligence, in the absence of averments as to who were parties to the proceeding, or as to what the issues were, or that any issue was formed on the question of whether such chattel mortgage was filed within the time required by statute. p. 483.
4. ACKNOWLEDGMENTS.—*Sufficiency of Certificate.—Essentials for Recording.*—Under §7472 Burns 1908, Acts 1897 p. 240, providing

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that as a prerequisite to the recording of a chattel mortgage, it shall be acknowledged as provided in cases of deeds of conveyance, and §3982 Burns 1908, §2947 R. S. 1881, providing what shall constitute a sufficient acknowledgment of any deed or mortgage, a certificate to a chattel mortgage merely stating that the mortgagors signed the instrument, was invalid, and such mortgage was not entitled to be recorded. p. 485.

5. **CHATTEL MORTGAGES.—Invalid Certificate of Acknowledgment.—Effect of Recording.**—Where a chattel mortgage was not admissible to record because not bearing a proper certificate of acknowledgment, it was valid only as between the parties, and the recording of same within ten days after its execution could not extend its efficacy so as to affect even those having actual notice. p. 486.
6. **MORTGAGES.—Foreclosure.—Answer.—Sufficiency.—Negligence in Recording Chattel Mortgage.**—In an action to foreclose a mortgage, an answer averring that plaintiff had been given a chattel mortgage which was to be the primary security, and that because of plaintiff's negligence in recording the same the lien thereof was lost, was insufficient to constitute a defense to the action, where it also appeared that because of an invalid acknowledgment such chattel mortgage was not entitled to record, since actionable negligence can not be predicated on any delay or neglect in filing an instrument for record where the act of recording can give it no added efficacy. p. 486.
7. **JUDGMENT.—Former Adjudication.—Burden of Proof.**—Defendant, who tenders the issue of former adjudication, has the burden of proof thereon. p. 487.
8. **TRIAL.—Exceptions to Conclusions of Law.—Effect.**—Exceptions to conclusions of law admit, for the purposes of the exceptions, that the facts within the issues were fully and correctly found. p. 487.
9. **APPEAL.—Questions Reviewable.—Ruling on Motion for New Trial.—Sufficiency of Special Findings.**—The sufficiency of a special finding of facts is not tested by a motion for a new trial, where the ruling on such motion was not properly presented for review on appeal. p. 487.
10. **TRIAL.—Special Findings.—Sufficiency.**—In an action to foreclose a mortgage, where defendants contended that plaintiff had been given a chattel mortgage which was to be the primary security, but that plaintiff had lost the lien of same by its negligence in recording it, a finding of facts showing that plaintiff was merely a nominal party in the proceeding in which plaintiff's security under such chattel mortgage was denied, that the real party in interest was one of the defendants in the foreclosure suit, and that in such prior proceeding such chattel mortgage was

adjudicated not to be a lien for the reason that it was not filed for record in time, are consistent with and support the conclusion of law against the defendants on the issue that plaintiff's negligence in recording such chattel mortgage was adjudicated in such former proceeding, in the absence of a finding that plaintiff was charged with any duty with respect to recording same. p. 487.

11. CHATTEL MORTGAGES.—*Evidence.—Execution.—Presumptions.*—The execution of a chattel mortgage is completed by delivery, and while, in the absence of a showing to the contrary, such an instrument will be presumed to have been executed on the day of the date it bears, it is always permissible to show the true date of execution, and to that end to show when it was delivered, even though the date thus established is different from the date which it bears on its face. p. 488.
12. TRUSTS.—*Action by Trustee.—Pleading.*—In an action by the trustee of an express trust, the complaint should disclose the name of the *cestui que trust*, and show that the suit is prosecuted for his benefit. p. 490.
13. PARTIES.—*Designation.—Surplusage.*—Where the plaintiff in an action to foreclose a mortgage was designated in the caption of the complaint as trustee, and the facts alleged showed that plaintiff was the real owner of the debt and the mortgage securing it, the use of the term trustee must be regarded as *descriptio personae* and therefore mere surplusage that could not affect the finding and judgment for plaintiff. p. 490.
14. BILLS AND NOTES.—*Execution.—Delivery.*—Delivery is the final step in the execution of a note, and the issue of its nonexecution can be raised only by an answer of *non est factum*, so that in an action where the notes involved were in plaintiff's possession and were introduced in evidence without objection, and there was no issue formed respecting their execution, the special finding of facts was not insufficient for failure to include a specific finding that the notes in suit were delivered. p. 491.

From Hendricks Circuit Court; *James L. Clark*, Judge.

Action by The Union Trust Company of Indianapolis, Trustee, against William Guyer and others. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

William Bosson and *Brill & Harvey*, for appellants.

Charles W. Smith, *John S. Duncan*, *Henry H. Hornbrook* and *Albert P. Smith*, for appellee.

CALDWELL, J.—Appellee commenced this action in the Superior Court of Marion County, declaring on a series of

fifteen notes, alleged to have been executed by appellant, William Guyer, to the Union Trust Company of Indianapolis, and on a real estate mortgage securing the notes, alleged to have been executed by William Guyer and appellant, Maggie Guyer, his wife. The venue of the cause was

changed to the Hendricks Circuit Court, where the

1. trial was had. The complaint was not tested by
'demurrer or motion in the court below, and while its sufficiency is challenged in this court by an assignment of error, such assignment is waived by not being discussed in appellants' brief.

In addition to William Guyer and Maggie Guyer, the appellants, John Guyer and Mary Guyer, his wife, Charles B. Guyer and Dessie L. Guyer, his wife, Flora F. Zink and Samuel B. Zink, her husband, and Sallie Katie Guyer are made defendants to the complaint, it being alleged that the additional defendants claim some interest in or lien upon the real estate described in the mortgage. It is alleged that John, Charles B. and Sallie Katie Guyer, and Flora F. Zink are children of William and Maggie Guyer. Copies of the notes are filed as exhibits to the complaint. They aggregate \$1,250, exclusive of interest, and each bears date of September 28, 1905. Each of the notes is made payable to the Union Trust Company of Indianapolis, or order, at the office of the Union Trust Company of Indianapolis, Indiana, and is signed by William Guyer, as maker. A copy of the mortgage is also filed with the complaint and made an exhibit thereto. It shows on its face that it was signed and acknowledged by William and Maggie Guyer on September 28, 1905. It is made to the Union Trust Company of Indianapolis, Indiana, trustee, as mortgagee. The notes are accurately described therein, except that the following language is used as descriptive of the maker and payee of the notes, to wit: "All of said notes being executed by William Guyer and Maggie Guyer, and payable to said mortgagee." Said mortgage contains also the following provision, to wit:

“The said mortgagors hereby expressly agree to pay all and singular the sums of money by this mortgage above secured, without relief from valuation or appraisement laws of the State of Indiana.” The notes and the mortgage introduced in evidence on the trial of the cause are identical with said copies exhibited with the complaint.

Briefly stated, the facts in this case are in part as follows: On March 21, 1905, the Union Trust Company of Indianapolis, as receiver, offered for sale certain personal property connected with the “Club Stables,” located on West Market Street, Indianapolis. Appellant, Charles B. Guyer, desired to purchase the property, but the receiver being unwilling to take his note for the deferred payment, appellant, William Guyer, father of Charles B. Guyer, became at least the nominal purchaser thereof, and thereupon paid the purchase price, partly in cash and the residue by the execution of his promissory note to the receiver in the sum of \$1,300, maturing September 21, 1905, and secured by a chattel mortgage on the property sold. William Guyer, soon after the purchase of the property, transferred it by bill of sale to Charles B. Guyer, who thereupon took possession of it, and retained such possession until March —, 1906, when he made a general assignment for the benefit of his creditors. The note not having been paid, William Guyer negotiated with the Union Trust Company for a loan, the proceeds to be used in the payment of the note held by the trust company as receiver. Pending the negotiations, the trust company caused to be prepared a series of sixteen promissory notes and a real estate mortgage, describing real estate owned by William Guyer. Six of the notes were in the sum of \$50 each and the remaining ten were in the sum of \$100 each. The notes and mortgage and the certificate of acknowledgment to the latter bear date of September 28, 1905, on which day William Guyer signed the notes and mortgage, and he and his wife signed and acknowledged the latter. There was some controversy at the trial

of the cause as to when the notes and mortgage were delivered to the trust company and accepted by it, but it was not controverted that they were at some time delivered and accepted, and the loan consummated and the proceeds thereof used to discharge the note held by the trust company as receiver. One of the \$50 notes was paid. The other fifteen and the mortgage are the notes and mortgage, copies of which are exhibited with the complaint. At the time when William Guyer signed the notes and mortgage, he signed also a chattel mortgage purporting to mortgage to the trust company said personal property. In the body of the chattel mortgage, both William Guyer and Charles B. Guyer are named as mortgagors, the mortgagee named therein being the Union Trust Company of Indianapolis. It describes the sixteen notes as secured thereby, except that in the description of the notes occurs the following: "All of which are executed by the mortgagors to the Union Trust Company" and also "negotiable and payable at the office of the Union Trust Company." The chattel mortgage contains also the following provision: "All the property herein named shall be treated as primary security." The chattel mortgage is signed by both William Guyer and Charles B. Guyer, and immediately after their signatures is found the following, in place of a certificate of acknowledgment: "In witness whereof the mortgagors have hereunto set their hands and seals this 3rd day of October, 1905. Benj. H. Dugdale, Notary Public. My commission expires May 26, 1908."

Among the matters controverted are, as to when the execution of the chattel mortgage was completed by delivery; whether it was recorded within ten days after its execution, as required by the statute; if not, whether the trust company was negligent in not filing it for record; whether it bears such a certificate of acknowledgment as entitled it to record; whether any or all of these matters were adjudicated in the proceedings growing out of the voluntary

assignment of Charles B. Guyer. The relationship that William Guyer and the trust company bear to the chattel mortgage, and whether it was executed for the benefit of William Guyer are also in controversy. There is also a controversy respecting the effect that must be assigned to the evident discrepancy in the use of the name of the trust company as it appears in the complaint and in the various instruments.

All the defendants, except Sallie Katie Guyer, joined in an amended answer, which we shall designate as the first paragraph of answer. The answer is very lengthy, but the substance of it is as follows: that the trust company, to induce William Guyer to execute the real estate mortgage, securing the loan, agreed to take also the chattel mortgage containing the provision that the property therein described should be the primary security; that under such inducement William Guyer did execute the real estate mortgage; that the chattel mortgage was delivered to the trust company more than ten days before November 14, 1905, but that it negligently failed to file it for record within ten days after its execution was completed by delivery, and did not file it for record until November 14, 1905, alleged to be more than ten days after its execution was completed, as aforesaid; that in the proceeding wherein Charles B. Guyer made a general assignment for the benefit of his creditors, the mortgage was adjudged invalid as against the creditors of Charles B. Guyer, by reason of its not having been recorded within ten days as aforesaid, whereby William Guyer lost the protection that he might otherwise have had under the chattel mortgage; that the property described in the chattel mortgage was worth more than \$2,000 and sold for more than that sum at the assignee's sale.

It is contended by appellants that the answer states a good cause of defense on the theory that the trust company held the chattel mortgage as primary security for the pay-

ment of the notes, and that it was charged with the duty of filing the chattel mortgage for record within the time specified by the statute; that it negligently failed to discharge its duty, whereby William Guyer lost the benefit of the protection that would otherwise have been afforded him by the chattel mortgage, and that such loss amounted to more than the sum due on the notes. It is urged also that there are facts pleaded in the answer presenting the defense of former adjudication. These facts are in substance as follows: That the Union Trust Company caused to be filed in the matter of said assignment the following paper:

“State of Indiana, Marion County. In the Marion Circuit Court. In the matter of the assignment of Charles B. Guyer. Comes now the Union Trust Company of Indianapolis, Indiana, and enters its appearance to the petition of Hiram W. Miller, assignee, dated April 30, 1906, asking for leave to sell property, and consents to the order being made as therein asked, and it represents that there is due it upon its mortgage indebtedness from Charles B. Guyer on his said mortgage executed by him, dated October 3, 1905, as therein described, the sum of about \$1,300 more or less, and they ask that their lien be properly protected by transferring same to the proceeds derived from such sale. Union Trust Company, By James W. Harper, Atty.”

That such proceedings were had in the cause as that the probate commissioner to whom the same was referred, found among other things, that the chattel mortgage was delivered to the Union Trust Company on or before October 12, 1905, but was not recorded by it until more than ten days after its execution, to wit, November 14, 1905; that the probate commissioner further found that the indebtedness secured by the chattel mortgage was also secured by a mortgage upon real estate of a value sufficient to pay such indebtedness; that on the findings, the circuit court of Marion County made its finding and entered its judgment and decree in substance that the indebtedness was secured by a mortgage executed by William Guyer on real estate amply sufficient

in value to pay the indebtedness owing by William Guyer to the Union Trust Company; that the real estate be first exhausted before any of the assets or funds in the hands of the assignee be resorted to for the purpose of paying such indebtedness.

To the first paragraph of answer, appellee filed a reply in two paragraphs, the first of which was a general denial. By the second paragraph, the facts are specifically set out respecting the origin of the note held by the receiver, the negotiating of the loan and the execution and delivery of the notes and mortgage sued on in this action. It is further alleged in substance that the chattel mortgage was executed at the request of William Guyer, and pursuant to an agreement that it should be executed solely for the protection of William Guyer, and that appellee should not be charged with any duty or responsibility respecting it; that it was agreed that William Guyer should be permitted to take steps for his own protection in the name of the trust company, at any time when he deemed it necessary, in order that the chattel mortgage might be enforced; that the petition so filed in the assignment proceeding was filed and prosecuted to termination by William Guyer, and on his own motion, by his attorney, James W. Harper, pursuant to their agreement, and that the trust company was merely a nominal party thereto; that Harper was at all times attorney for William Guyer, and that he was at no time attorney for the trust company; that the chattel mortgage was delivered to the trust company on or after November 10, 1905, and by it filed for record on November 14, 1905. Subsequently, the appellants John Guyer and Mary Guyer, his wife, Charles B. Guyer and Dessie L. Guyer, his wife, Flora F. Zink and Samuel B. Zink, her husband, and Sallie Katie Guyer filed a second paragraph of answer, alleging in substance that John Guyer, Charles B. Guyer, Flora F. Zink and Sallie Katie Guyer are children of William and Maggie Guyer, and that on October 10, 1905, William and Maggie

Guyer conveyed the lands described in the complaint to said children by warranty deed, subject to all liens and encumbrances thereon, and that at the time, while the notes and mortgage declared on in this action had been executed by William and Maggie Guyer, they had not been delivered to the trust company, and were not so delivered until November 13, 1905, and that at that time William Guyer had no interest in the real estate, except a life estate therein reserved by the deed, and that, therefore, the mortgage was not a lien on the lands.

To the second paragraph of answer, the appellant replied specifically, repeating the history of the transaction and the origin and nature of the chattel mortgage, substantially as alleged in the special paragraph of reply to the first paragraph of answer, and alleging further that on September 28, 1905, William Guyer executed the notes, and he and his wife executed the real estate mortgage, and delivered them into the possession of the trust company, and that the trust company held them pending the approval of the contemplated loan by the executive committee of the trust company, and the examination and approval of the title to the real estate, and under an agreement to make the loan when approved as aforesaid; that the answering defendants took and accepted the deed with full notice and knowledge of the facts alleged in the reply; that at the time of the execution of the deed on October 10, Charles B. Guyer executed to John Guyer and Sallie Katie Guyer a mortgage on his interest in the lands under the deed, to protect him against the lien of the mortgage so held by the trust company.

These answers and replies were not tested in the trial court by demurrer or otherwise, and their sufficiency is not challenged in this court. The issues so joined were tried by the court, and on request, the court made and filed a special finding of the facts with conclusions of law stated thereon.

The conclusions of law are as follows: "1. That the law of the case is with the plaintiff upon the facts above found. 2. That the plaintiff is entitled to recover upon the notes, copies of which are exhibited with the complaint in this cause, against William Guyer. 3. That the plaintiff is entitled to a decree of this court foreclosing the mortgage exhibited with the complaint in this cause against all the defendants." On the findings and conclusions of law, the court entered judgment in favor of appellee, the Union Trust Company of Indianapolis, trustee, for the use and benefit of the Union Trust Company of Indianapolis, against appellant William Guyer, in the sum of \$1,812.34, and decreed the foreclosure of the mortgage against all the appellants. Appellant, William Guyer, filed a motion for a new trial, which was overruled. The other appellants did not file a motion for a new trial.

All the appellants assign error in the following form: "The appellants aver that there is error in the proceedings, and judgment in the said cause, in this: 1. The complaint of the appellee does not state facts sufficient to constitute a cause of action. 2. The court erred in the conclusions of law stated upon the special findings of fact. 3. The court erred in overruling the appellants' motion for a new trial." As hereinbefore indicated, appellants

1. have waived the error first assigned by not discussing it in their brief. And, as we have said, the only motion for a new trial appearing in the record is the

2. sole and separate motion of the appellant, William Guyer. The error assigned is joint, and there is no

separate assignment by appellant William Guyer. Under such circumstances, the third assignment of error that the court erred in overruling the appellants' motion for a new trial presents no question. *Fowler v. Newsom* (1910), 174 Ind. 104, 90 N. E. 9; *Meyer v. Meyer* (1900), 155 Ind. 569, 58 N. E. 842; *Gough v. State, ex rel.* (1903), 32 Ind. App. 22, 68 N. E. 1043; *Johnson v. Blair* (1904), 32 Ind. App.

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456, 70 N. E. 85; *Earhart v. Farmers Creamery* (1897), 148 Ind. 79, 47 N. E. 226; *Louisville, etc., R. Co. v. Smoot* (1893), 135 Ind. 220, 33 N. E. 905, 34 N. E. 1002; *Arbuckle v. Swim* (1890), 123 Ind. 208, 24 N. E. 105. This leaves for our consideration only the second assignment of error. As has been indicated, the assignment of errors is joint as to parties. The second assignment is also joint as to the conclusions of law, and is therefore joint both as to parties and as to said conclusions. Such being the state of the record, we merely suggest whether the second assignment presents any question, in view of the fact that the second conclusion evidently affects William Guyer as an individual, and his coappellants as a class, severally rather than jointly, and in view of the further fact that while Sallie Katie Guyer joins in assigning error, she did not join in the first paragraph of answer, which is the only paragraph of answer pleaded against the asserted right to recover on the notes and against which paragraph of answer the second conclusion of law is stated. As Sallie Katie Guyer is not combating the right to recover on the notes, can she be heard to say that the second conclusion of law affects her?

We proceed, however, to consider the conclusions of law on their merits. It will be remembered that appellants contend that appellee's right to recover on the notes

3. is defeated by reason of its alleged negligence in causing the chattel mortgage to be recorded.

Appellants contend also that the negligence and the alleged consequent injury to appellant William Guyer were adjudicated in the voluntary assignment proceeding, and that such issue of former adjudication is presented by the first paragraph of answer. This paragraph of answer is not sufficient to present such issue. It gives us no information respecting who were parties to the proceeding, except what may be gathered from the petition filed in the name of the trust company. There is nothing in the answer to show

that William Guyer or any other appellant was a party to the petition or to the proceedings, save in the restricted sense in which the assignee may be said to have represented Charles B. Guyer, the failing debtor. This paragraph of answer does not show what pleadings were filed or what issues were formed between appellee and William Guyer or any other appellant. Without an issue, or a challenge to an issue between two parties, there can be no adjudication between them. Woolen, Trial Proc. §1852, *et seq.*; 1 Works' Practice §605. Moreover, if it should be conceded that both William Guyer and the trust company were parties to the assignment proceeding, there is nothing in the second paragraph of answer or in the record to indicate that any issue was formed between them on the question of whether the chattel mortgage was recorded within the time required by the statute, and if not, through whose negligence or violation of duty there was a failure to file it for record within such time. From the very nature of the situation, it would seem that they could not be arrayed the one against the other on the question. In that proceeding, if both were interested, they were certainly interested in enforcing rather than in destroying such chattel mortgage; but, assuming that they were arrayed on the same side of the proceeding, unless there was an issue formed between them involving the validity of the chattel mortgage and involving the negligent failure to file it for record, in which charges were made by the one against the other, while such proceedings might result in an adjudication of these questions as between either or both of them and the party or parties opposed to them, it could not result in such an adjudication as between either of them and the other. *Finley v. Cathcart* (1898), 149 Ind. 470, 478, 48 N. E. 586, 49 N. E. 381, 63 Am. St. 292; *Jones v. Vert* (1889), 121 Ind. 140, 22 N. E. 882, 16 Am. St. 379; *Harvey v. Osborn* (1877), 55 Ind. 535; *Westfield Gas Co. v. Noblesville, etc., Grav. Road Co.* (1895), 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. 244; *Leaman v.*

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Sample (1883), 91 Ind. 236; 23 Am. and Eng. Ency. Law 731, 732, 737, 738; 2 Van Fleet, Former Adjudication §424; Wells, Res Adjudicata §§14, 16.

Moreover, as we have said, the so-called certificate of acknowledgment to such chattel mortgage is in form as

follows: "In witness whereof, the mortgagors have

4. hereunto set their hands and seals this 3rd day of October, 1905." As a prerequisite to the recording

of such an instrument, it is provided that it "shall be acknowledged as provided in cases of deeds of conveyance."

§7472 Burns 1908, Acts 1897 p. 240. The statutory provision respecting acknowledgment and the form of certificate in case of a deed of conveyance is as follows: "The following, or any other form substantially the same, shall be a good and sufficient acknowledgment of any deed or mortgage. Before me, E. F. [a judge or justice, as the case may be], this — day of —, A. B. acknowledged the execution of the annexed deed [or mortgage, as the case may be.]" §3982 Burns 1908, §2947 R. S. 1881.

Conceding that the statute should be liberally construed, and that only a substantial compliance with its terms is required, still it is evident that the alleged certificate of acknowledgment is totally lacking in the features essential to its validity and sufficiency as such. It may be construed as a statement by the notary that the mortgagors signed it, but there is no certificate that the mortgagors acknowledged the signing or execution of the instrument. The certificate is invalid under the following authorities: *Dewey v. Campau* (1857), 4 Mich. 565; *Blair v. Sayre* (1887), 29 W. Va. 604, 2 S. E. 97; *Watson v. Michael* (1883), 21 W. Va. 568; *White v. Magarahan* (1891), 87 Ga. 217, 13 S. E. 509; *Henderson v. Grewell* (1857), 8 Cal. 581; *Bryan v. Ramirez* (1857), 8 Cal. 461, 68 Am. Dec. 340; *Hughes v. Morris* (1892), 110 Mo. 306, 19 S. W. 481; *Hockman v. McClanahan* (1890), 87 Va. 33, 12 S. E. 230; *O'Ferrall v. Simplot* (1853), 4 Green (Iowa) 162; *Reynolds v. Kingsbury* (1863),

15 Iowa 238; *Brinton v. Seevers* (1861), 12 Iowa 389; *Sutton v. Pollard* (1891), 16 S. W. (Ky.) 126; *Spitznagle v. Vanhessch* (1882), 14 N. W. (Neb.) 417; *Becker v. Anderson* (1881), 11 Neb. 493, 9 N. W. 640; *Smith v. Garden* (1871), 28 Wis. 685; *Roanes v. Archer* (1833), 4 Leigh (Va.) 550; *Westhafer v. Patterson* (1889), 120 Ind. 459, 22 N. E. 414, 16 Am. St. 330; *Mays v. Hedges* (1881), 79 Ind. 288; 1 Cyc. 672, *et seq.*; *Trerise v. Bottego* (1905), 108 Am. St. 563,

note. Under such circumstances, the chattel mort-

5. gage was not entitled to be recorded, and even though recorded within ten days after its execution, it would be valid only between the parties to it, and would be invalid as against any other person, even though such person had actual notice of its existence. *Ross v. Menefee* (1890), 125 Ind. 432, 439, 25 N. E. 545; *Lockwood v. Slevin* (1866), 26 Ind. 124; *Kennedy v. Shaw* (1872), 38 Ind. 474; *Sidener v. Bible* (1873), 43 Ind. 230; §7472 Burns 1908, *supra*.

It is not claimed that the trust company was charged with the duty of procuring the proper acknowledgment of such chattel mortgage or with any consequent negligence

6. in failing to perform such duty. The negligence charged is the alleged failure of the trust company to file the instrument for record within ten days after its execution. From what has been said, it is apparent that actionable negligence could not be predicated on such negligent failure, for the reason that no injury could result therefrom to William Guyer or to any other appellant. The recording of an instrument with such an apparent absence of acknowledgment could not give it any potency as between the parties thereto, or as against third persons, that it did not already have, not having been recorded. It follows that the facts stated in the first paragraph of answer, if proven would not constitute a defense to this action on

the theory of the negligent failure to record the in-

7. strument. Moreover, on the issue of former adjudication, if presented, the burden was on appellants. As

has been said, the trial court made a special finding of facts to which appellants excepted, and thereby admitted,

8. for the purposes of the exception, that the facts which were within the issues, were fully and correctly found. *Ray v. Baker* (1905), 165 Ind. 74, 74 N. E. 619; *Kisling v. Barrett* (1904), 34 Ind. App. 304, 71 N. E. 507. The

ruling on the motion for a new trial not being prop-

9. erly presented, such findings are not tested by such motion. *Kisling v. Barrett, supra*. In harmony with the allegations of the reply to the first paragraph of

10. answer, the court found in substance that in the assignment proceeding, James W. Harper was acting for William Guyer, rather than for the trust company, and that the latter was merely a nominal party to the proceeding, William Guyer being the real party in interest. The court found also that in the assignment proceeding, it was adjudicated that the chattel mortgage was not a lien on the personal property, for the reason that it was not filed for record within ten days of its execution. There is no finding by the trial court that in the assignment proceeding, it was adjudicated that the trust company was charged with any duty respecting the chattel mortgage or that the fact that it was not filed for record within ten days of its execution, was occasioned by the trust company's negligent failure to perform such a duty, or that the adjudication was based on any issue formed between appellee and William Guyer or any other defendant. The findings, therefore, in so far as concerns the issue of former adjudication, are consistent with and support the second conclusion of law.

It being determined that the question respecting the validity of the chattel mortgage as against third persons, based on whether it was recorded within ten days from its execution was not adjudicated in the assignment proceeding as between the parties to this proceeding, and that the findings of the trial court do not go to that extent, we next take up the matter from another viewpoint, as determined

by the trial court. The statute provides in substance that no mortgage of personal property shall be valid against any other person than the parties thereto, when such personal property is not delivered to and retained by the mortgagee, unless such mortgage shall be acknowledged, as provided in case of deeds of conveyance, and recorded within ten days after the execution thereof in the recorder's office of the county where the mortgagor resides. §7472

Burns 1908, *supra*. The execution of an instrument 11. is completed by its delivery. Said chattel mortgage is dated October 3, 1905, and, in the absence of a showing to the contrary, it is presumed to have been executed on that date. However, it is always permissible to show the true date of execution of such an instrument, and to that end to show when it was delivered, even though the date thus established is different from the date which the instrument bears on its face. *Hornbrook v. Hetzel* (1901), 27 Ind. App. 79, 60 N. E. 965; *John Shillito Co. v. McConnell* (1891), 130 Ind. 41, 26 N. E. 832; *Briggs v. Fleming* (1887), 112 Ind. 313, 14 N. E. 86; *Davar v. Cardwell* (1867), 27 Ind. 478. The trial court expressly found that the chattel mortgage, bearing date as aforesaid, was not delivered to the trust company until November 13, 1905, and that it was filed for record and recorded on November 14, 1905. Such finding is controlling on the issue involved and as a consequence, there was no negligence or omission of duty in the matter of recording the chattel mortgage, assuming that it was the duty of the trust company to record it.

We have yet to consider the question of the discrepancy in the name or characterization of the trust company, as used in the various pleadings and instruments. The facts are as follows: The suit is brought in the name of the Union Trust Company of Indianapolis, trustee. The notes by the terms thereof, are made payable to the Union Trust

Company of Indianapolis, or order, at the office of the Union Trust Company of Indianapolis, Indiana. The real estate mortgage is made to the Union Trust Company of Indianapolis, Indiana, trustee, as mortgagee, and the mortgage provides that the notes therein described are payable to the mortgagee. The mortgage also contains a provision by which the mortgagors expressly agree to pay all and singular the sums of money secured by the mortgage. The notes and also the mortgage were introduced in evidence by appellee on the trial of the cause without objection. The chattel mortgage, with reference to which appellants constructed their defense, as set out in the first paragraph of answer, is made to the Union Trust Company of Indianapolis, as mortgagee, and describes the notes as being executed to the Union Trust Company. Appellants' defense of former adjudication is based on the alleged filing of the petition in the assignee proceeding by the Union Trust Company. Unless an effect to the contrary must be given to the fact that the term "trustee" is appended to the name of the trust company as it appears in the caption to the complaint, the special findings are sufficient to sustain a conclusion of law that there should be a recovery on the notes as against William Guyer. The court by its decree entered on its conclusions of law adjudged that the appellee, the Union Trust Company of Indianapolis, trustee, should have and recover of appellant, William Guyer, for the use and benefit of the Union Trust Company of Indianapolis, the sum of \$1,812.34, and decreed the foreclosure of the mortgage as against all the appellants, and the sale of the real estate therein described, the application of the proceeds to the payment of the costs and the judgment, and that the surplus, if any, be paid to the clerk of the court, subject to the further order of the court.

The statute authorizes a trustee of an express trust to sue without joining the beneficiary of the trust as a party.

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§252 Burns 1908, §252 R. S. 1881. In such case, the

12. complaint should disclose the name of the *cestui que trust*, and facts should be alleged to the effect that the suit is prosecuted for his benefit. *Marion Bond*

13. *Co. v. Mexican Coffee, etc., Co.* (1903), 160 Ind. 558, 65 N. E. 748. In the case at bar it is alleged that the notes were executed by William Guyer to the Union Trust Company of Indianapolis, and the copies of the notes filed as exhibits to the complaint show that the Union Trust Company of Indianapolis is payee therein. The body of the complaint then, with the exhibits shows a cause of action on the notes in favor of the Union Trust Company of Indianapolis, and there is no averment that the appellee is trustee of an express trust, or of any other kind of a trust, or that it is prosecuting this action for the benefit of any third person. Under such circumstances, the term "trustee" appended to the name of the Union Trust Company of Indianapolis, in the caption of the complaint should be treated as mere *discriptio personae*. To this effect are the following authorities: *Marion Bond Co. v. Mexican Coffee, etc., Co., supra*; *Ditton v. Hart* (1911), 175 Ind. 181, 184, 93 N. E. 961; *Funk v. Davis* (1885), 103 Ind. 281, 285, 2 N. E. 739; *Crawford v. Spindler* (1913), *ante* 1, 103 N. E. 388; *Williams v. Dougherty* (1906), 37 Ind. App. 449, 77 N. E. 305; *Tate v. Shackelford* (1854), 24 Ala. 510, 60 Am. Dec. 488; *Arrington v. Hair* (1851), 19 Ala. 243; *Gibson v. Land* (1855), 27 Ala. 117, 125; *George v. English* (1857), 30 Ala. 582. There are a number of indications in the record that appellants on the trial of the cause treated the term "trustee" as merely descriptive of the person and therefore as surplusage. Among these indications are that appellants permitted the notes and mortgage to be introduced in evidence without objection, as aforesaid, and further, that appellants based their defense as against the notes, on transactions had respecting the chattel mortgage,

made to the Union Trust Company, and the petition filed in the assignment proceeding by or in the name of the trust company. The term "trustee" is not appended to the name of the trust company in either of the documents. *Digan v. Mandel* (1906), 167 Ind. 586, 77 N. E. 899, 119 Am. St. 515, is cited by appellants. In that case, Mandel, as the endorsee of Troutman, prosecuted an action on a promissory note against the estate of O'Donnell. O'Donnell was the maker of the note, and the City National Bank of Logansport was the payee thereof. It was alleged in the complaint that in preparing the note, the bank was named as payee, rather than Troutman, through mistake and inadvertence. Issues were formed on the allegations of mistake and inadvertence, and it was held that the specific title must be proven as laid, and that to that end it was incumbent on appellee to prove the allegations. The case cited is distinguishable from the case at bar. In the case at bar, the complaint contains no allegations of mistake or inadvertence, and, as we have shown, neither it nor the sufficiency of the evidence is challenged. The question here is as to the sufficiency of the findings to sustain the conclusions of law. The correctness of the findings is not questioned, and, as we have said, appellants have not only waived their right to challenge the findings, but also, for the purposes of the matters under discussion, are held to concede that the facts are correctly found. Besides, as indicated above, the trust company and appellee, under the record in this case, must be held to be one and the same person, so that it was not necessary that the complaint trace the title to the notes from the former to the latter.

It is urged that there is no specific finding that the notes in suit were delivered. The execution of a written instrument includes its delivery. Delivery is the
14. final step in the execution of such an instrument.

The issue of nonexecution can be raised only by an answer of *non est factum* and no such answer was filed.

Appellee had possession of such notes and introduced them in evidence without objection. There being no issue formed respecting the execution of the notes, it was not necessary for the court to find specifically that they were delivered. *Digan v. Mandel, supra*; and *Godman v. Henby* (1905), 37 Ind. App. 1, 76 N. E. 423, are cited. In each of these cases an answer of *non est factum* was filed.

We hold that the second conclusion of law is properly stated on the special findings. The court expressly found that there was no consideration for the deed executed to certain of the appellants on October 10, 1905, other than love and affection, and that the grantees thereto took and accepted the deed with notice. Under such circumstances, the second conclusion of law being properly stated, it is not contended that the first and third are not justified by the findings.

There is no error in the record that warrants a reversal and the judgment below is affirmed.

NOTE.—Reported in 104 N. E. 82. As to what will release surety, see 28 Am. St. 691. As to the general requirements for validity in respect of judgments, see 112 Am. St. 22. For a discussion of the effectiveness as notice of a recorded instrument not entitled to record, see Ann. Cas. 1913 B 1070. See, also, under (1) 3 Cyc. 388; (2) 2 Cyc. 1003; (3) 23 Cyc. 1527; (4) 1 Cyc. 591; (5) 1 Cyc. 528; (6) 27 Cyc. 1549; (7) 23 Cyc. 1532; (8) 38 Cyc. 1992; (9) 38 Cyc. 999; (10) 38 Cyc. 1986; (11) 6 Cyc. 1007, 1008; (12) 39 Cyc. 458; (13) 31 Cyc. 99; (14) 8 Cyc. 155.

DREBING ET AL. v. ZAHRT ET AL.

[No. 7,896. Filed February 6, 1914.]

1. PLEADING.—*Answer*.—*Counterclaim*.—*Demurrer*.—In an action to quiet title, a pleading, designated as an answer, which stated facts showing that defendants were the owners of the equitable title to the real estate in controversy, and asked for affirmative relief, was in fact a counterclaim and its sufficiency could be

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properly challenged only by demurrer for want of facts sufficient to constitute a cause of action. p. 494.

2. **PLEADING.—*Determining Sufficiency.***—In determining the sufficiency of a pleading, the substance, rather than the form or the name that has been given to it by the pleader, is the controlling factor. p. 494.
3. **APPEAL.—*Review.—Rulings on Defective Demurrers.***—Where the demurrer to an insufficient pleading is defective in form, the overruling of same will be justified on appeal on the ground that the trial court regarded such demurrer so defective as to present no question; but if such a demurrer has been sustained without objection as to its form or substance, it will be regarded on appeal as sufficient to present the question of the sufficiency of the pleading, on the theory that it was so treated in the trial court. p. 495.
4. **QUIETING TITLE.—*Counterclaim.—Sufficiency.***—In an action to quiet title, a counterclaim alleging that the real estate had been conveyed to plaintiff's grantor by the father of defendants with an agreement for a reconveyance upon the payment of certain indebtedness to plaintiffs' grantor, that long after such conveyance plaintiffs' grantor and the father of defendants disagreed as to the state of their accounts and that no complete settlement was ever had, that after such disagreement, but long before the conveyance to plaintiffs, such agreement for reconveyance was placed of record, and that plaintiffs purchased with full knowledge of the facts, and praying that the deed be declared a mortgage and for a reconveyance to defendants, the sole heirs of their father, on payment by them of the amount due, was sufficient to withstand a demurrer. pp. 495, 497.
5. **MORTGAGES.—*Deeds as Security.—Redemption from Purchaser.***—Redemption from a deed absolute in form, but given merely as security for a debt, may be made by the heirs of the grantor against persons buying from the grantee with knowledge of the facts. p. 497.
6. **LIMITATION OF ACTIONS.—*Pleading.—Demurrer.***—The statute of limitations is an affirmative defense and cannot be raised by demurrer unless the pleading affirmatively shows on its face that sufficient time has elapsed to operate as a bar and that the case is not within any exception preventing the running of the statute. p. 497.

From Laporte Circuit Court; *John C. Richter*, Judge.

Action by Henry A. Zahrt and others against Olive Drebing and others. From a judgment for plaintiffs, the defendants appeal. *Reversed.*

M. R. Sutherland and *R. N. Smith*, for appellants.

Fred R. Liddell, for appellees.

LAIRY, C. J.—Appellees instituted this suit to quiet their title to certain real estate described in the complaint. The adult defendants filed a joint answer in general denial and also a pleading designated as a second paragraph of answer and the guardian *ad litem* filed similar answers on behalf of the infant defendants. The appellees demurred to the second paragraph of answer filed by the guardian *ad litem* and also to the second paragraph of answer filed by the adult defendants. Both of these demurrers were sustained. The cause was tried by the court upon the issues tendered by the complaint and closed by the general denial, and the finding and judgment were in favor of appellees, quieting their title as prayed.

The first error assigned and relied on for reversal is that the trial court erred in sustaining the demurrer to the second paragraph of answer. This pleading though

1. designated by the pleader as a second paragraph of answer states facts which show that the defendants are the owners of the equitable title to the real estate
2. in controversy and asks for affirmative relief. In determining the sufficiency of a pleading, the court will be controlled by its substance rather than by its formal parts or by the name which has been given it by the pleader. Judged by this criterion, the second paragraph of answer filed by the guardian *ad litem* and the one filed by the adult defendants are in substance counterclaims, and they must be so considered in passing on their sufficiency. *Harness v. Harness* (1878), 63 Ind. 1; *Gilpin v. Wilson* (1876), 53 Ind. 443. As the substance of these pleadings shows them to be counterclaims instead of answers, their sufficiency should have been challenged by demurrers on the ground that they did not state facts sufficient to constitute a cause of action, rather than on the ground that they did not state facts

sufficient to constitute a cause of defense, as was done in this case. If a demurrer, defective in form, is addressed to a pleading which is insufficient and is overruled by the trial court, the ruling, when considered on appeal, can be justified on the ground that the trial court regarded the demurrer so defective in form as to present no question; but where a demurrer to a pleading is sustained, and where no objection as to the form or substance of the demurrer was presented to the trial court, it becomes apparent that the court and the parties treated it as sufficient in form and substance to present the question of the sufficiency of such pleading, and it will be so treated on appeal. *Terre Haute, etc., R. Co. v. Pierce* (1884), 95 Ind. 496; *Blue v. Capital Nat. Bank* (1896), 145 Ind. 518, 43 N. E. 655; *Fall v. Hazelrigg* (1874), 45 Ind. 576, 15 Am. Rep. 278.

The substance of each of these paragraphs of counterclaim is as follows: in the year 1878, Gustavus Drebing was the owner of the real estate described in the complaint, and that on that date he was indebted to Henry Drebing in the sum of \$3,790 and to secure such indebtedness, he executed and delivered to him a warranty deed to the real estate described, upon the understanding and agreement that whenever the indebtedness was paid the real estate should be reconveyed to Gustavus Drebing. As evidence of the agreement to reconvey, the parties to such deed on the date of its execution, signed the following memorandum of agreement.

“Memorandum of agreement made this 30th day of May, 1878, by and between Henry Drebing and Gustavus Drebing, both of Laporte, witnesseth: That Henry Drebing hereby agrees to sell and reconvey to Gustavus Drebing, the twenty foot and eighteen inch of the middle part of lot 128 O. S. Laporte, Indiana, this day conveyed by warranty deed by the said Gustavus Drebing to the said Henry Drebing. This sale and reconveyance to be made at any time when the said Gustavus Drebing shall pay to said Henry Drebing the amount of

certain notes and obligations held by the said Henry Drebing vs Gustavus Drebing, and upon the payment of whatsoever mortgages there are now upon said premises and which the said Henry Drebing has assumed and agreed to pay. Witness our hands and seals this 30th day of June, 1878. Signed, Henry Drebing, Gustavus Drebing."

These pleadings further state in substance that Henry Drebing took possession of said real estate under such deed and written agreement to reconvey and that it was further agreed at that time that he was to collect the rents, and, after paying the expenses incident to renting the buildings and keeping the same in repair, he was to turn over the net proceeds to Gustavus; that this arrangement was carried out until 1884, at which time a dispute arose between them as to the amount each owed the other, and Henry refused to account for the rent and Gustavus refused to pay further interest; that the parties were never afterward able to agree on an accounting and the matter was left open and unsettled; that on September 15, 1887, the written memorandum to reconvey was placed of record; that on August 28, 1890, Henry Drebing conveyed said real estate to the plaintiffs by warranty deed and that, at the time of such conveyance, the plaintiffs had full knowledge of the nature of the deed from Gustavus Drebing to Henry Drebing and of the nature of the transaction and agreements made in connection therewith and that they purchased said premises with full knowledge and notice thereof; that plaintiffs took possession of said real estate under such deed and ever since have collected the rents and profits of the same for which they have never accounted; that Gustavus Drebing is dead and that the defendants who file these counterclaims are his sole and only heirs. The defendants by their several counterclaims pray that an accounting be taken by the court of the matters between Gustavus and Henry Drebing and that the amount due from the defendants be ascertained; that the deed from Gustavus to Henry Drebing be

declared a mortgage and that upon payment by the defendants of the amount due, that a reconveyance be decreed, or that their title be quieted. These pleadings clearly show that the deed which was executed by Gustavus Drebing to Henry Drebing was intended to convey the legal title as security for a debt, and that the equity of redemption remained in Gustavus Drebing. If appellees took a

5. conveyance of such real estate from Henry Drebing with full knowledge of these facts as averred in the counterclaims, their title would be no better than that of their grantor, and the heirs of Gustavus Drebing may assert as against them their right to redeem, under the same terms and conditions as Gustavus Drebing might have asserted such right against Henry Drebing.

We are not able to determine from the brief of appellees the grounds upon which the demurrers were sustained to these paragraphs of counterclaim. It is suggested

6. that the ruling may have been based upon the ground that the pleadings show upon their face that the statute of limitations had run as against appellees' right to redeem. The statute of limitations is an affirmative defense which must be pleaded. It cannot be raised by a demurrer to a pleading unless such pleading discloses the defense. It has been held that the defense of a statute of limitations is not disclosed upon the face of a pleading unless such pleading shows affirmatively not only that sufficient time has elapsed to operate as a bar before the pleading was filed, but also shows that the case does not fall within any exception which could have prevented the running of the statute. *Swatts v. Bowen* (1895), 141 Ind. 322, 40 N. E. 1057; *Thornburg v. Buck* (1895), 13 Ind. App. 446, 41

N. E. 85. The ruling of the court in sustaining demurrers to these pleadings cannot be sustained on this ground. In other respects the pleadings seem to be sufficient and the demurrers were improperly sustained.

Appellants by their brief, present the further question that the decision of the court is not sustained by the evidence, while appellees assert that this question is not before the court for the reason that the evidence is not properly in the record. We do not find it necessary to pass upon either of the questions thus presented. The judgment must be reversed for the error already pointed out and, as the issues will be different on another trial, the evidence cannot be expected to be the same. For this reason, a discussion of the sufficiency of the evidence in this case could be of little value at another trial.

The judgment of the trial court is reversed with direction to overrule the demurrers filed by plaintiffs to the second paragraph of answer of the guardian *ad litem* and also to the second paragraph of answer of the adult defendants, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 104 N. E. 46. As to what is an equitable mortgage, see 4 Am. St. 696. See, also, under (1) 31 Cyc. 320; (2) 31 Cyc. 46, 225, 226; (3) 3 Cyc. 291; (4) 32 Cyc. 1361; (5) 27 Cyc. 1032; (6) 25 Cyc. 1401.

SEIGMUND v. WILLIAMS.

[No. 8,791. Filed February 6, 1914.]

1. **WATERS AND WATERCOURSES.—Surface Waters.—Action for Damages.—Findings.**—On a special finding of facts showing that defendant's remote grantors had for more than twenty years maintained drains which carried surface water into a culvert, and across a highway to and over a low strip in plaintiff's lands, whence such water was carried into a natural watercourse, and that such drains were in natural depressions and carried no water that would not naturally have flowed through such depressions, the court did not err in denying to plaintiff any relief in his action for damages for casting surface waters upon his lands. p. 500.
2. **APPEAL.—Review.—Harmless Error.**—Where the findings of fact disclose that plaintiff failed to prove his case, questions on the

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overruling of demurrers to defendant's answers are immaterial. p. 501.

3. APPEAL.—*Review.—Evidence.—Findings.*—Where there was some evidence to support each of the material facts found by the court, the decision is sustained by sufficient evidence. p. 502.

From Miami Circuit Court; *Joseph N. Tillett*, Judge.

Action by Christopher H. Seigmund against Charles E. Williams. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

D. F. Brooks and *Cox & Andrews*, for appellant.

Warren G. Sayre and *Nelson G. Hunter*, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor in an action brought by appellant to recover damages from appellee for collecting water on his lands by means of tile drains and casting it onto appellant's lands, and to enjoin the continued use of such drains.

The case is, in all its essential features, except as hereinafter indicated, identical with that of *Seigmund v. Tyner* (1913), 52 Ind. App. 581, 101 N. E. 20. The appellant is the same person, and appellee insists that the instant case "not only involves the same rules of law but, that the grievances complained of happen to be on the identical forty acre tract of land as in the *Seigmund v. Tyner* case." The issues of law and fact presented by the pleadings in the two cases are identical and their merits are controlled by the same general principles of law; but the present case differs from the former in that in it the facts to which such general principles must be applied are specially found by the trial court, and the finding is such that a determination of the question presented by the error assigned, which challenges the correctness of the conclusion of law stated thereon, eliminates all questions presented by the rulings on the pleadings about which there is any serious contention.

The finding of facts is too lengthy to set out in this opinion, and we deem it sufficient to say that the facts so found

are even more favorable to appellee than those set
1. out as the undisputed facts in the case of *Seigmund v. Tyner, supra*. In addition to finding practically the same facts, set out as undisputed, in that case, the court in the present case found the specific facts with reference to the purpose, time and place of location of said tile drains in question, viz., that said drains were located by appellee's remote grantors, while they owned his lands; some of said drains having been located in 1878 for drainage purposes, others having been put in "in 1887, and more than twenty years before the commencement of this suit * * * in the sole interest of good husbandry and because such remote grantor claimed the right to do so", and others, at other remote periods, more than twenty years prior to the bringing of this suit, were put in to render such land tillable and to prevent the water from flowing over its surface and causing it to wash; that such drains were each and all located in the bottom of natural depressions in such lands, some of which, in places, had well defined banks and said tile drains carried no water that would not naturally have flowed through such natural depressions; that such tile drains carry said water into the one or the other of three culverts put across the public highway for its protection at points where the water falling on said drained lands had found its outlet from time immemorial and where such water from necessity had to flow; that after the water from all of the drains and from the Tyner land flows through the stone culvert it flows in a low depression across plaintiff's land and empties into Ross Run; that said tile drains do not carry any water onto plaintiff's land which does not naturally flow onto plaintiff's land at the same point where it now flows nor do they increase the volume of water discharged upon plaintiff's land in any given time nor do they bring down onto plaintiff's land any greater quantities in any given time and the water has had no effect upon plaintiff's land on account of the construction of said tile

drains, neither has the construction of said tile drains caused any damage to plaintiff's crops or any washing to plaintiff's land or any damage whatever to plaintiff's land; that the water conducted by said tile drain would naturally flow in the same direction and in the same volume if said tile drain had not been constructed and the construction of said tile drain has in no way injured the crops of the plaintiff or caused his land to wash or caused his land to be damaged in any way whatever; that all of said tile drains described in these findings do not put any greater quantity of water on the plaintiff's land than always flowed there and do not now, and never have, discharged said water upon plaintiff's land with any greater velocity than it has always been discharged upon said land and has not caused plaintiff's land to wash and has not washed away any crops on plaintiff's land and has not damaged plaintiff's land in any way whatever.

We think it must be evident from the facts which we have indicated as found by the trial court that under the holding of this court in the case of *Seigmund v. Tyner*, *supra*, the conclusion of law as stated by the trial court was correct. Indeed, we think all the authorities including those cited by appellant support such conclusion. *Mitchell v. Bain* (1895), 142 Ind. 604, 617, 42 N. E. 230; *Weddell v. Hapner* (1890), 124 Ind. 315, 24 N. E. 368; *Templeton v. Voshloe* (1880), 72 Ind. 134, 37 Am. Rep. 150; *Weis v. City of Madison* (1881), 75 Ind. 241, 256, 39 Am. Rep. 135; *Cairo, etc., R. Co. v. Stevens* (1881), 73 Ind. 278, 38 Am. Rep. 139; *Vannest v. Fleming* (1890), 79 Iowa 638, 44 N. W. 906, 8 L. R. A. 277, 18 Am. St. 387; *Wharton v. Stevens* (1891), 84 Iowa 107, 50 N. W. 562, 15 L. R. A. 630, 635, 35 Am. St. 296.

We have also indicated that this finding of facts eliminates all questions presented by the rulings on demurrers to the answers. We think this must be evident because the facts, above indicated as found, show

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that the appellant failed to prove his cause of action. Appellant raises some question as to the sufficiency of the evidence to sustain the decision of the trial court, but an examination of the evidence set out in appellant's

3. brief convinces us that there was some evidence to support each of the material facts found by the court.

We find no available error in the record. Judgment affirmed.

NOTE.—Reported in 104 N. E. 49. As to the discharging of surface water upon a neighbor's land, see 85 Am. St. 730. See, also, under (1) 40 Cyc. 645, 648; (2) 3 Cyc. 385; 31 Cyc. 358; (3) 3 Cyc. 360.

JOURDAN v. TOWN OF LAGRANGE.

[No. 8,829. Filed February 17, 1914.]

1. MUNICIPAL CORPORATIONS.—*Negligence.—Complaint.—Demurrer.*—In an action against a town for injuries to an employe while at work on its streets, where the complaint was on the theory that the rule *respondet superior* applied to the facts set out, objections on demurrer thereto that the town could not be liable for the reason that it is a subdivision of the State and was at the time performing a State function were not applicable. p. 506.
2. MUNICIPAL CORPORATIONS.—*Ministerial Functions.—Street Paving.*—In prosecuting the details of the work of paving a street a city performs a mere ministerial duty, and not one enjoined upon it as a subdivision of the State; hence it is not exempt from liability for injuries to its employe by its negligence in the prosecution of such work. p. 506.
3. MASTER AND SERVANT.—*Injuries to Servant.—Complaint.—Conclusions.*—In an action for injuries received while plowing a street preliminary to paving same, a complaint alleging that defendant knew that there was a plow specially designed for plowing hard streets with safety to those using same, that defendant failed to procure a good and improved plow for said purpose, but furnished an ordinary plow, knowing at the time that it was extrahazardous and dangerous to use a common plow for such purpose, was insufficient as stating mere conclusions, in the absence of averments showing in what respect the plow used was not suitable, or in what manner a different plow would have been better suited. p. 506.
4. MASTER AND SERVANT.—*Injuries to Servant.—Duty of Master.—Tools and Appliances.*—A master is not obliged to use the most

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improved appliances in his work, but is only required to use ordinary care to furnish safe appliances; hence a city is not chargeable with negligence in furnishing an employe an ordinary plow to be used in plowing a public street. p. 507.

5. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.*—Plaintiff, who was injured by being thrown from the beam of a plow on which he was riding while plowing a street, must be deemed to have assumed the risk, in the absence of allegations showing that he was unfamiliar with the plow and the uses to which it was put, since a man of common understanding must have known that if the point of the plow came in contact with any hard substance it would jump and be likely to throw a man riding on the beam so as to injure him. p. 507.
6. NEGLIGENCE. — *Action. — Pleading.* — In common-law actions founded upon negligence, the negligence relied on must be charged in terms, or facts must be averred sufficient to compel the inference of negligence constituting the proximate cause of the injuries sustained. p. 508.
7. MUNICIPAL CORPORATIONS.—*Public Improvements.—Negligence.*—Placing an eight-inch sewer pipe fifteen inches under the ground in a public street is not negligence rendering the city liable for injuries to an employe engaged in plowing the street, caused by the plow coming in contact with such pipe. p. 508.
8. MASTER AND SERVANT.—*Injuries to Servant.—Negligence of Fellow Servants.*—An employe injured while engaged in plowing a street cannot recover if the injury resulted from the negligence of fellow servants in the operation of the plow. p. 508.
9. MASTER AND SERVANT.—*Injuries to Servant.—Complaint.—Authority of Foreman.*—In an action for injuries to a servant alleged to have occurred while working under the order or direction of an agent or servant of defendant, the complaint must show that such person had authority to give such order or direction. p. 509.

From Lagrange Circuit Court; *James S. Drake*, Judge.

Action by Abraham L. L. Jourdan against the Town of Lagrange. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

James S. Dodge, for appellant.

Leroy A. Foster and *Hanan, Ewbank & Hanan*, for appellee.

SHEA, J.—Appellant brought this action against appellee to recover damages for injuries sustained by him through

appellee's alleged negligence while in its employ, plowing one of its streets. The complaint in one paragraph, omitting the formal parts, reads as follows: "That on the 28th day of June, 1909, the said defendant, by its officers and agents, was engaged in paving a portion of one of the public streets of said defendant known as Lafayette Street, at a point near where the same intersects Detroit Street in said defendant town; that in the prosecution of said work, the said defendant, by its officers and agents, engaged in plowing a portion of said Lafayette Street, immediately east of Detroit Street and on the north side of Lafayette Street in said town; that the said defendant at said time well knew that there was manufactured and for sale, a plow known as the roter plow, manufactured for the purpose of plowing or breaking up hard streets with safety to those using the same; that the said defendant at said time and place unmindful of its duty to provide its agents and employes with safe tools to work with, wholly failed and refused to procure a good and sufficient and improved plow for said purpose, but on the contrary furnished to its officers and agents an ordinary plow for their use in breaking up said Lafayette Street as aforesaid; that said defendant well knew at the time that it was extrahazardous and dangerous to use a common farm plow for the purpose of breaking up the surface of a hard street immediately over sewer pipe buried therein only fifteen inches under the surface of the street and running longitudinally with said street, which facts were at the time unknown to plaintiff; that at the point where the said defendant was plowing or breaking up said Lafayette Street as aforesaid, the said defendant, at some time prior to the said plowing as hereinbefore set forth, and wholly unknown to the plaintiff, had constructed, or caused to be constructed, a sewer of eight-inch sewer pipe, buried about fifteen inches under the surface of the ground and extending east and west on the north side of said Lafayette Street; that at said time and

place, as hereinbefore set forth, this plaintiff was in the employ of the said defendant and was directed and ordered by the officers and agents of said defendant, at said time and place, to ride the beam of the said common farm plow in order to force the said plow into said hard ground or street; that the said defendant at said time and place, by its officers and agents knew, or by the exercise of ordinary care should have known, that at said time and place, said eight-inch sewer pipe was about fifteen inches below the surface of the street, and the said defendant knew that in breaking up the street in manner and form as hereinbefore set forth, the said plow would strike or catch in the end of said sewer pipe, and would then and there and thereby violently throw and injure this plaintiff; that this plaintiff at said time and place, and while employed by the said defendant as aforesaid, in obedience to the commands of the said defendant, its officers and agents, took his position upon the beam of said plow and attempted to hold the same in the ground, while the same was being driven and used as hereinbefore set out, and while being so driven, the said plow caught in the end of one of the said eight-inch sewer pipes, without the knowledge of the plaintiff; that plaintiff, at said time and place had no knowledge, or means of knowing, that said sewer pipe was in the ground at said place as hereinbefore set forth; that when said point of said plow caught in the end of said sewer pipe as hereinbefore set forth, the said plow was jerked and wrenched, and the same threw plaintiff with great force and violence, in such a manner that plaintiff's right leg came in violent contact with parts of said plow, and plaintiff's said leg was then and there cut and bruised'', etc.

Appellee's demurrer to the complaint was sustained, and this ruling is assigned as error. Judgment was rendered that plaintiff take nothing by his complaint and pay the costs of the suit. With its demurrer, appellee filed a memorandum setting out eighteen alleged defects. The first and

second grounds of objection present the question of

1. the liability of appellee, claiming that the town is a subdivision of the State, and was at the time performing a State function, therefore there can be no liability for the alleged negligent acts of appellee and the resulting injury to appellant. The theory of the complaint is that the rule *respondeat superior* applies to the facts set out. Therefore the principle sought to be invoked in the first and second causes for demurrer can have no application.

It is clear that in the actual prosecution of the

2. details of the work of repairing the street in question, appellee was performing a ministerial duty, and therefore not engaged in discharging a duty enjoined upon it as a subdivision of the State in the exercise of legislative powers. Therefore, if the complaint shows that the city owed a duty to appellant, and that the city has been guilty of negligence which was the proximate cause of appellant's injury complained of, it will withstand a demurrer. *City of Anderson v. East* (1889), 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. 35; *City of Lebanon v. McCoy* (1895), 12 Ind. App. 500, 40 N. E. 700.

The complaint contains allegations showing that appellant was employed by appellee at the time and place in question, and was directed by some servant or agent

3. to perform the particular work. It is not charged that he was within the line of his duty, neither is there any averment as to what his duties were under his employment by appellee. It is charged that the appellee knew that there was manufactured and for sale, a plow known as the rooter plow, used for the purpose of plowing up hard streets with safety to those using the same; that appellee, unmindful of its duty to provide its agents and employes with safe tools to work with, failed and refused to procure a good and improved plow for said purpose, but furnished to its officers and agents an ordinary plow for their use; that appellee well knew at the time that it was

extrahazardous and dangerous to use a common farm plow for the purpose of breaking up the surface of a hard street immediately over sewer pipe, buried therein only fifteen inches under the surface of the street and running longitudinally with the street, which facts were at the time unknown to appellant. It is not stated in what manner an ordinary plow was not suited for the purposes for which it was used, nor is it stated in what manner a rooter plow would be better suited. These statements of the pleader are conclusions pure and simple. It is not charged that there was any defect in the plow used, but it is in fact stated that it was an ordinary plow.

The proximate cause of appellant's injury, to wit, the contact of the plow with the sewer pipe, is not directly charged to be the negligence of appellee. It is not

4. negligence to use an ordinary plow in plowing a public street, as the master is not obliged to use the most improved appliances in his work. He is only charged with the duty to use ordinary care to furnish safe appliances. *Indianapolis Abattoir Co. v. Neidlinger* (1910), 174 Ind. 400, 404, 92 N. E. 169; *Indiana Car Co. v. Parker* (1885), 100 Ind. 181, 187; *Lake Shore, etc., R. Co. v. McCormick* (1881), 74 Ind. 440, 446. It is not charged in the complaint that appellant was unfamiliar with

5. the plow and the uses to which it was put. Its condition was open and obvious, so far as the allegations of the complaint show, to the servant as well as to the master. A man of common understanding must have known that if the point of the plow came in contact with a stone or sewer pipe or any hard substance, it would jump and likely throw a man riding the beam, and possibly injure him. It is true the complaint alleges that appellee knew the use of the plow in the public street was extrahazardous, but this is far from charging any defect in the plow itself. It was used by appellant and his fellow servants, and the manner and character of the use was open

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and obvious to them. Under such circumstances, there was a clear assumption of risk. In the case of *Swanson v. City of Lafayette* (1893), 134 Ind. 625, 627, 33 N. E. 1033, the court says: "Where the danger is alike open to the observation of all, both the master and the servant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the business." Citing

numerous authorities. The Supreme Court of this

6. State in the case of *Cleveland, etc., R. Co. v. Perkins* (1908), 171 Ind. 307, 313, 86 N. E. 405, used this language, which is quite applicable to the case now under consideration: "It will be observed first, that no act or omission of appellant is characterized as negligent, and that word appears only in the disconnected and isolated conclusion toward the end of the pleading, 'that said injuries to plaintiff wholly resulted from the negligence and want of care of the defendant and the breach of its duty toward him'. The principle has been announced frequently, and enforced in common law actions founded upon negligence, that the negligence relied upon must be charged in terms, or facts must be averred sufficient to compel the inference of such negligence as will constitute the proximate cause of the injuries sustained. *Cumberland Tel., etc., Co. v. Pierson* (1908), 170 Ind. 543, [84 N. E. 1088]; *Pittsburgh, etc., R. Co. v. Schepman* (1908), 171 Ind. 71, [84 N. E. 988]; *Laporte Carriage Co. v. Sullender* [1905], 165 Ind. 290, [75 N. E. 270]; *Pennsylvania Co. v. Marion* (1885), 104 Ind. 239, [3 N. E. 874]."

It is not negligence to bury an eight-inch sewer pipe fifteen inches under the ground in the street. It is not charged

that there was any negligence in the operation of

7. the plow. The men in charge of the plow were, so far as the pleading shows, the fellow servants of appellant; and any negligence of which they may

8. have been guilty would defeat appellant's recovery.

It is charged that some officer or agent of appellee

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directed appellant to ride the beam of the plow. It is not charged that this was a foreman or other person whose orders he was bound to obey. The allegation that an agent or servant gave the order must show the servant's authority. *Pittsburgh, etc., R. Co. v. Adams* (1886), 105 Ind. 151, 169, 5 N. E. 187; *Cleveland, etc., R. Co. v. Peirce* (1904), 34 Ind. App. 188, 192, 194, 72 N. E. 604. The allegations are not sufficient to charge this as the act of the master, as it may have been a mere suggestion of some fellow workman to whose orders he was not obliged to conform, so that the allegations do not bring the complaint within the terms of §2 of the Employers Liability Act (§8017 Burns 1908, Acts 1893 p. 294). No act of negligence upon the part of appellee is properly charged in the complaint as the proximate cause of the injury, neither can it be ascertained by any reasonable or fair inference.

The memorandum filed with the demurrer clearly presents the above questions.

Judgment affirmed.

NOTE.—Reported in 104 N. E. 104. As to nonrequirement that master furnish servant the latest designed and best possible implement to work with, see 98 Am. St. 293. As to the servant's assumption of risk from latent danger or defect, see 17 L. R. A. (N. S.) 76. As to the assumption of obvious risks of hazardous employment, see 1 L. R. A. (N. S.) 272; 38 L. Ed. U. S. 391. See, also, under (1) 28 Cyc. 1263; (2) 28 Cyc. 1286; (3) 26 Cyc. 1386, 1389; (4) 26 Cyc. 1107; (5) 26 Cyc. 1188, 1196; (6) 29 Cyc. 570, 572; (7) 28 Cyc. 1315; (8) 26 Cyc. 1276; (9) 26 Cyc. 1391.

HALLAGAN ET AL., EXECUTORS, v. JOHNSTON.

[No. 8,239. Filed February 18, 1914.]

1. APPEAL.—*Waiver of Error*.—Alleged error is waived by appellants' failure to discuss same. p. 511.
2. JUDGMENT.—*Conclusiveness*.—*Parties*.—*Purchase of Property*.—While a judgment duly rendered is conclusive upon all the parties to the suit and their privies, one, who was not a party to a

pending suit for the replevin of mortgaged chattels, and who purchased a horse of the defendant mortgagor at public auction, was not bound by the judgment subsequently rendered so as to preclude him from showing that the horse he purchased was not the one described in the mortgage. p. 513.

3. **REPLEVIN.—Description of Property.—Question for Court or Jury.**—The identity of property sought to be replevied, or the correctness of its description, is for the jury to determine from the evidence; but the question of the sufficiency of the description to pass title or sustain the action is for the court. p. 513.
4. **EVIDENCE.—Parol Evidence.—Identity of Mortgaged Chattels.**—In replevin to recover mortgaged chattels, the description in the mortgage or writ is not the only means of identifying the property, but parol evidence may be employed to aid in its identity. p. 514.
5. **CHATTEL MORTGAGES.—Property Covered.—Evidence.**—Evidence showing that a chattel mortgage covered a certain sorrel horse, seven years old, weighing about 1200 pounds and named "Charley", that a subsequent mortgage by the same mortgagor to another person described a sorrel horse eight years old, named "Barney", that the "Charley" horse had no marks, that "Barney" had certain marks, and that the horse purchased by plaintiff of the mortgagor at a public auction was a sorrel horse named "Barney," was sufficient to support a judgment for plaintiff in an action, for the conversion of his horse, against defendant who had taken the horse on execution under a judgment for replevin of the property covered by the first mortgage. p. 514.
6. **REPLEVIN.—Judgment.—Enforcement.**—To obtain any benefit of the adjudication of ownership in a replevin suit, where, pending the determination, the property remains with defendant, plaintiff should pursue the property by a writ of restitution, and, on failure to thus obtain the property, he should resort to the remedy of suit on the replevin bond; and where plaintiff followed the judgment in his favor by procuring the issuance of an ordinary execution, he waived whatever rights he had procured by the judgment *in rem*. p. 515.
7. **REPLEVIN. — Judgment. — Execution.** —Where defendants' decedent recovered a judgment in replevin for the return of a horse against a chattel mortgagor from whom plaintiff had purchased a horse, and caused an ordinary execution to be issued by virtue of which plaintiff's horse was taken and delivered to defendants' decedent, the proceedings following the judgment were irregular and unauthorized and could not preclude plaintiff from alleging and proving that the horse so taken was his own and that it was not the horse covered by the judgment in replevin. p. 515.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

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Action by James W. Johnson against James M. Hallagan and another as executors of the will of Patrick Hallagan, deceased. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Frank Foltz, for appellants.

George A. Williams, for appellee.

FELT, J.—Appellee recovered a judgment in the lower court against Patrick Hallagan, appellants' decedent, for damages for the conversion of a horse. From this judgment appellants prosecute this appeal and assign error of the trial court in overruling the decedent's demurrer to each paragraph of the complaint, and the motion for a new trial. The complaint is in two paragraphs. The first is in the usual short form, for the conversion of "a certain sorrel horse named Barney, about nine years of age." The second charges that the horse was taken from appellee, and delivered to decedent, by the sheriff of Pulaski County, by virtue of a writ of execution, issued upon a judgment recovered in suit of replevin, in which the decedent was plaintiff and one Henry Toomire was defendant, for the possession of certain personal property, including a certain sorrel horse belonging to appellee, and for the conversion of which this suit is brought; that appellee was not a party to the suit; that decedent knew that the horse so taken was the property of appellee and wrongfully and purposely told the sheriff that the horse of appellee aforesaid was the sorrel horse described in the judgment and writ of execution against Toomire; that the horse was wrongfully taken from appellee without his consent and wrongfully converted to decedent's own use, to appellee's damage in the sum of \$250.

The alleged errors in overruling the demurrers are waived for failure to discuss them. The assignment that the court

erred in overruling the motion for a new trial, ques-

1. tions the sufficiency of the evidence to sustain the verdict and the correctness of certain instructions

given by the court. It appears from the evidence, without conflict, that the horse in question in this suit was formerly owned by Toomire; that appellee bought the horse from Toomire at a public sale on February 14, 1910; that on October 5, 1907, Toomire mortgaged certain personal property to appellants' decedent, including "one sorrel gelding, seven years old, named Charley"; that by reason of default in payment of the debt secured by the mortgage the decedent brought suit in replevin for possession of the property at the February term, 1909, of the Pulaski Circuit Court; a writ of replevin was issued and levied on the property of Toomire who elected to give bond and retain possession of the property pending suit; that the description of the horse in the complaint and writ was the same as in the mortgage; that upon a hearing of the cause and default of Toomire, decedent was on September 21, 1910, adjudged to be the owner and entitled to the possession of the property described in the complaint including "one sorrel gelding", or in lieu thereof damages in a given amount for the unlawful detention of the property; that on October 4, 1910, an ordinary execution was issued on the judgment commanding the sheriff to levy upon the property of Toomire within the county subject to execution, to satisfy the judgment, interest and costs; that by virtue of the writ the sheriff levied on the horse bought by appellee at public sale, as the property of Toomire, though in the possession of appellee, and turned the same over to appellants' decedent together with the other property of Toomire, who received the same and receipted in full the judgment against Toomire. Appellants contend that the evidence shows conclusively and without dispute, that the horse involved in this suit is the horse for which Toomire gave bond in the replevin suit brought by their decedent and that appellee is bound by the judgment in that suit and cannot be heard upon the question as to whether the horse sold him and involved in this suit is identical with the

horse mortgaged to appellants' decedent and involved in the replevin suit and the writ issued therein. As above

indicated, the undisputed facts show that Toomire

2. mortgaged a sorrel horse named "Charley" to appellants' decedent on October 5, 1907; that the replevin suit was begun in February, 1909, at which time the replevin bond was executed; that appellant bought the horse in controversy in February, 1910; that judgment in the replevin suit against Toomire was rendered on September 4, 1910, and the execution thereon was issued on October 4, 1910. It thus plainly appears that when appellee bought the horse at the Toomire sale no judgment had been rendered in the replevin suit and there was therefore, at that time, no adjudication as to the ownership of the horse in controversy in this suit as against either Toomire or appellee. It is true that a judgment duly rendered is conclusive upon all the parties to the suit and their privies. *Craighead v. Dalton* (1886), 105 Ind. 72, 4 N. E. 425; *Oster v. Broe* (1903), 161 Ind. 113, 124, 64 N. E. 918. But there is no claim that appellee was a party to the replevin suit or that he had any actual knowledge thereof. As there was no adjudication of ownership at the time of the sale, appellee to become privy with Toomire must be shown to have purchased or otherwise come into the possession of the identical horse covered by the chattel mortgage and described in the complaint and writ of replevin against Toomire.

The complaint alleges that the horse claimed by appellee and taken by appellants' decedent was not the horse covered

by the Hallagan mortgage and involved in the re-

3. plevin suit. This raised the issue of the identity of the horse and if there is any evidence tending to support this material averment of the complaint, the verdict is conclusive upon that question. Wells, Replevin (2d ed.) §175 says: "Where the identity of the property or the correctness of the description becomes a question, it is for

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the jury to determine from the evidence. * * * But if the question was as to the sufficiency of a given description to pass title or sustain the action, it would be for the court, and not the jury, to decide." This is the rule in Indiana.

It is also held that the description given in the mort-

4. gage or writ is not the only means of identifying the property, but that parol evidence may be employed to aid in determining the identity of the property. *Koehring v. Aultman, Miller & Co.* (1892), 7 Ind. App. 475, 477, 34 N. E. 30; *Baldwin v. Boyce* (1898), 152 Ind. 46, 51, 51 N.E.334; 1 Cobbey, Chattel Mortgages §§158-160. Rec-

ord evidence was given showing that on July 7, 1906,

5. Toomire gave to appellants' decedent a chattel mortgage on one sorrel horse, seven years old, weighing about 1,200 pounds and named "Charley"; that on October 5, 1907, he executed the chattel mortgage, which was the basis of the replevin suit aforesaid, and as a part of the property mortgaged, described "one sorrel gelding, seven years old named 'Charley'"; that on March 13, 1907, Toomire executed a mortgage to a Mr. Wood on one sorrel horse eight years old named "Barney". In addition to the foregoing record evidence, there was parol evidence tending to prove that Toomire mortgaged to appellants' decedent one sorrel horse about eight years old named "Charley", without marks; that the sorrel horse taken by Toomire to Pulaski County was not included in the Hallagan mortgage; that the horse sold to appellee at Toomire's sale in Pulaski County was a sorrel horse about nine years old named "Barney" weighing 1,000 pounds and had a blazed face, silver mane and tail and two white hind feet; that the horse so sold was not included in the Hallagan mortgage; that the sorrel horse described in the Hallagan mortgage died before the sale and was never taken to Pulaski County; that the sorrel taken from appellee and turned over to decedent was the sorrel horse named "Barney" purchased by him at Toomire's sale. The evidence tends strongly to support the

verdict of the jury and we cannot therefore reverse the judgment on the insufficiency of the evidence.

But on the facts of this case there is a further reason, why the judgment must be affirmed. As already shown there was no adjudication of ownership of the horse as against anyone when appellee purchased the horse. But without taking this fact into account and conceding appellant's contention that the undisputed evidence shows that the horse in controversy was the one upon which the writ of replevin was levied, it does not follow that the judgment

of the lower court is erroneous. To have obtained

6. any benefit of the adjudication of ownership in the replevin suit, appellants must have pursued the property by a writ of restitution and failing to obtain the property, resorted to the remedy of a suit upon the replevin bond. Instead of doing this, an ordinary writ of execution was issued, commanding the sheriff "To levy said sum of money of the property of the defendant Henry Toomire * * * subject to execution * * * and return this writ in one hundred eighty days." The issuance of this execution and subsequent proceeding thereon were irregular and for the purposes of this case, at least, appellants thereby waived whatever rights they may have acquired by the judgment *in rem*. To obtain the benefit of such judgment, appellants should have procured a writ of restitution for the return of the identical property therein described and failing to obtain it, should have resorted to the ample remedy afforded by the bond.

As against the ordinary writ of execution issued against Toomire, no presumption can be indulged against appellee.

If property in his possession was levied on by such

7. writ as the property of Toomire, it should have been appraised and offered for sale in the regular way provided by statute. The procedure in this case was irregular and unauthorized. The sheriff had no right, at the suggestion of appellants' decedent or otherwise, to take the

horse arbitrarily from appellee and turn him over to the decedent. The fact that he assumed to exercise such power did not deprive appellee of the right to allege and prove his lawful possession and ownership of the horse taken from him by the sheriff and disposed of in the irregular manner aforesaid.

Some questions are suggested relating to the instructions, but the objections urged are shown to be untenable by the propositions already announced in this opinion. In our view of the case, some of the instructions were more favorable to appellants than the law warrants. The questions in issue were submitted to the jury by instructions entirely fair to appellants and there is evidence tending to support the verdict.

Judgment affirmed.

NOTE.—Reported in 104 N. E. 91. As to pleading, practice and evidence in replevin, see 80 Am. St. 766. See, also, under (1) 3 Cyc. 388; (2) 23 Cyc. 1280; (3) 34 Cyc. 1519; (4) 17 Cyc. 724; (5) 38 Cyc. 2084; (6) 34 Cyc. 1544; (7) 34 Cyc. 1553.

FOX v. WORM ET AL.

[No. 8,252. Filed February 19, 1914.]

1. APPEAL.—*Review.*—*Insufficient Briefs.*—*Affirmance.*—Appellant's failure to comply with the rules of the court in the preparation of his brief, to the extent that no question is presented, requires an affirmance of the judgment appealed from. p. 517.
2. APPEAL.—*Briefs.*—*Curing Defects.*—*Reply Brief.*—Omissions in appellant's original brief pointed out by appellees' brief cannot be cured by supplying them in the reply brief. p. 517.

From Superior Court of Marion County (82,121); *Charles J. Orbison*, Judge.

Action between William A. Fox and Albert R. Worm and others. From the judgment rendered, William A. Fox appeals. *Affirmed.*

Eli F. Ritter, for appellant.

J. W. Kealing and *J. E. McCullough*, for appellees.

SHEA, P. J.—Appellees in this case point out several omissions in the preparation of appellant's brief. The second, third and fourth are as follows: “(2) Said

1. appellant's brief contains no statement showing how the issues were decided or what the judgment or decree was, as required by clause 3, Rule 22 of this court. (3) The appellant's brief contains no statement disclosing the errors relied upon for reversal, as required by clause 4 of Rule 22 of this court. (4) The appellant's brief contains no statement of so much of the record as presents any error or exception relied on, nor does it contain any reference to pages and lines of the transcript touching any such error or exception relied on, as required by clause 5 of Rule 22 of this court.” The seventh point charges that the evidence is not in the record. Other errors are pointed out, but these are sufficient for present purposes.

In appellant's reply brief, he attempts to cure some of the errors by pointing out the page and line of the record showing the submission of the cause, setting out the

2. entry of submission. He also refers to the page and line of the record showing the judgment, setting out the judgment. He also shows by reference to page and line of the record the entry showing the filing of the motion for a new trial, with copy thereof, and the ruling of the court thereon. It has been held by both this court and the Supreme Court that omissions in the original brief pointed out by the answer brief of appellee can not be cured by supplying them by reply brief. *Albaugh Bros., etc., Co. v. Lynas* (1911), 47 Ind. App. 30, 93 N. E. 678; *Gates v. Baltimore, etc., R. Co.* (1900), 154 Ind. 338, 56 N. E. 722.

There is no explanation even in the reply brief of the failure to set out the assignment of errors in the original brief, neither is it pointed out where the assignment

1. of errors may be found in the record. The failure to set out the assignment of errors in the brief is in direct violation of subdivision 4 of Rule 22 of this court.

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Griffith v. Felts (1913), 52 Ind. App. 268, 99 N. E. 432, and authorities there cited.

Because of the failure to file a brief in accordance with the rules of this court, the judgment is affirmed.

NOTE.—Reported in 104 N. E. 93. See, also, under (1) 2 Cyc. 1013; 3 Cyc. 419; (2) 2 Cyc. 1018.

BAKER v. OSBORNE ET AL.

[No. 8,779. Filed February 20, 1914.]

1. APPEAL.—*Judgments Reviewable.—Final Judgment.—Judgment for Costs.*—Although the judgment appealed from was for costs only and did not contain the usual and proper statement that plaintiff take nothing by his complaint, it was a judgment from which an appeal could be prosecuted, where the record clearly disclosed a trial and a final and effectual disposition of the cause and a judgment for all costs rendered in pursuance of such disposition. p. 519.
2. APPEAL.—*Briefs.—Statement of Evidence.—Sufficiency.*—Where appellant's contention, in an action to enjoin the collection of assessments levied in a ditch proceeding, was that he had no notice of such proceeding, and his brief stated that the record in such proceeding, and proof of service, were introduced, showing that service was not had on him, without setting them out, there was no sufficient compliance with clause 5 of Rule 22, providing for a condensed recital of the evidence in narrative form. pp. 520, 522.
3. APPEAL.—*Briefs.—Admissions.—Scope and Effect.*—An admission in appellant's brief that the drainage commissioners made an order establishing a ditch carried with it the implication that they found the existence of the facts essential to jurisdiction, so that in the absence of an affirmative showing that appellant had no notice of the proceedings, it will be presumed as against collateral attack that he was properly served with notice. p. 521.
4. DRAINS.—*Proceedings to Establish.—Notice.—Service.*—Under §6142 Burns 1908, Acts 1907 p. 508, relating to notice in drainage proceedings, proper service of notice may be had by leaving a copy with the occupant of the lands affected, or by leaving a copy at the last and usual place of residence of the person to be served, or of the occupant of his lands, so that the testimony of a landowner that he had not "received" notice of a drainage proceeding was insufficient to show that such notice had not been served. p. 522.

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5. **APPEAL.—Briefs.—Failure to Show Error.**—The court on appeal will not go beyond appellant's brief in search of error to reverse the judgment below. p. 523.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Action by William P. Baker against Frank Osborne and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

William H. Parkinson and *John A. Dunlap*, for appellant.
George A. Williams, for appellees.

HOTTEL, J.—This is an action begun by appellant to enjoin appellees and each of them from the collection of an assessment levied against his land in a ditch proceeding had before the Board of Commissioners of Jasper County, Indiana. The complaint proceeds on the theory that such assessment against appellant's lands was void, because he had never had any notice of such proceedings before the board, and that such assessment was made without the board having ever acquired jurisdiction of his person. A general denial to the complaint closed the issues of fact. The cause was submitted to the court for trial. There was a general finding for appellees and a judgment in their favor for costs. A motion for a new trial filed by appellant was overruled.

The errors relied on in appellant's brief present, in different form, practically the same question, viz., that of the sufficiency of the evidence to sustain the decision of the trial court. Before going to this question it should

1. be remarked that appellees insist that the record herein shows no final judgment within the meaning of §671 Burns 1908, §632 R. S. 1881, from which an appeal may be prosecuted. It is true that the judgment shown by the record is for costs only, and does not contain the usual and proper statement that plaintiff take nothing by reason of his complaint; but the absence of such statement in a final judgment is not fatal where, as in this case, the record clearly discloses a trial and a final and effectual dis-

position of the cause and a judgment for all costs rendered in pursuance of such disposition. *State, ex rel. v. Lung* (1907), 168 Ind. 533, 80 N. E. 541, and authorities there cited.

It is further contended by appellees that appellant has not complied with the rules of this court by setting out in his brief a concise statement of the evidence, in nar-

2. rative form and has therefore waived his right to a consideration of any question relating to the admission or sufficiency of such evidence. The evidence set out in such brief is very meager, and open to the criticism that it contains statements of appellant's conclusions as to what the evidence shows rather than a recital of the evidence in narrative form, as subd. 5, Rule 22 of this court, and the decisions construing it, require. *Webster v. Bligh* (1912), 50 Ind. App. 56, 98 N. E. 73; *Cleveland, etc., R. Co. v. Bowen* (1913), 179 Ind. 142, 100 N. E. 465; *Huffman v. Thompson* (1912), 177 Ind. 366, 98 N. E. 113; *Baker v. Gowland* (1906), 37 Ind. App. 364, 370, 76 N. E. 1027. As before indicated, appellant's contention is that there was no notice of the proceeding served on him. It was important therefore, and, under the rule and authorities above cited, necessary that he set out in his brief the evidence on this subject. The brief shows that the witness Mr. Leatherman, the auditor of the county, identified the record of the ditch proceeding, "and the order filing the petition, and fixing a day for docketing and notice ordered was introduced in evidence"; that the witness identified the record in such proceeding "showing proof of notice in said proceedings by which it appears that proof of service upon appellant was not made"; that he also identified "a paper as being the proof of service by O. P. Robinson in the * * * ditch proceeding, and the same was introduced in evidence as plaintiff's 'exhibit B', by which it appears that said notice was not served upon appellant." Neither the record, showing proof of notice, nor the paper identified as the proof of

notice is set out in the brief. Appellant's statement that from them "it appears that said notice was not served upon appellant" is a conclusion only and can not be said to be a condensed recital of the contents of such record or paper, and this court, without resort to the record can not know what were the contents of such record and paper.

Appellant in his brief admits that the original petition in the ditch proceeding described appellant's lands and alleged that he was the owner thereof, and that such

3. lands would be affected by and likely be benefited by such ditch. He also admits that orders of the board were introduced in evidence showing the qualification of drainage commissioners and extension of time for filing their report, the filing of their report, the bringing in new parties, the filing of certain remonstrances, the submission and trial of the cause, the assessment confirmed as modified by the court, the establishment of the ditch, allowances of expense bills, and the assignment of the improvement to W. Frank Osborne for construction. This admission of appellant carries with it the implication that the board found the existence of the facts necessary to give it jurisdiction, because the general order or judgment establishing the ditch which is admitted by appellant was a sufficient declaration of jurisdiction. "When the jurisdiction of such a court depends upon the finding of certain facts, the exercise of jurisdiction implies the finding of such facts." *Evansville Ice, etc., Co. v. Windsor* (1897), 148 Ind. 682, 691, 48 N. E. 592, and authorities there cited. See, also, *Osborn v. Sutton* (1886), 108 Ind. 443, 445, 9 N. E. 410. "Every court possesses the power of determining its own jurisdiction, both as to the parties and the subject-matter of the action. It is well settled that, when an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its judgment thereon is conclusive against collateral attack, unless the want of jurisdiction is apparent on the face of the proceedings. A de-

cision on a jurisdictional question, either expressly or impliedly given by a tribunal has the same binding effect upon the parties as a decision on any other matter within its cognizance in any pending case or proceeding, and an error in this respect must be corrected in the same manner as other errors are authorized to be corrected.” *Baltimore, etc., R. Co. v. Freeze* (1907), 169 Ind. 370, 374, 82 N. E. 761. See, also, *Larimer v. Krau* (1914), 57 Ind. App. —, 103 N. E. 1102, 105 N. E. 936; *Stoddard v. Johnson* (1881), 75 Ind. 20. “Whether there was or was not notice, was, of course, a jurisdictional question, and this question having been considered and determined by the commissioners’ court, that decision can not be subjected to review and overthrown by a collateral attack, such as the present. * * *

The general rule upon this subject, deducible from the authorities, may be thus stated: If there is no notice whatever, and this affirmatively appears upon the face of the proceedings, the judgment will be void, and may be overthrown by a collateral attack. If a court, having jurisdiction of the subject-matter, and required to determine all jurisdictional questions, either expressly or impliedly, adjudges that notice was given, its decision will repel a collateral attack, unless the record of the court affirmatively shows that no notice was given; and this is so although the record shows a defective and irregular notice.” *Muncey v. Joest* (1881), 74 Ind. 409, 412, and the authorities there cited. We cannot say from

2. appellant’s brief that the record of the board in the ditch proceedings affirmatively shows that no notice was given him.

Appellant also apparently lays some stress on that part of his own testimony set out in his brief as follows: “That

he did not receive notice at any time of the pending

4. of this petition in commissioners court for the establishment of the Prouty ditch.” Without indicating anything on the question of the correctness of the admis-

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sion of such evidence it is sufficient to say that it appears from the language quoted that appellant contented himself with saying that "he did not *receive* notice at any time", etc. So far as this statement shows a proper service of notice may have been had by copy left with appellant's occupant of the lands or by copy left at the last and usual place of residence of appellant or his occupant, in either of which cases, it being shown by appellant in his brief that he was a resident landowner, there would have been compliance with the statute providing notice in such cases. See §6142

Burns 1908, Acts 1907 p. 508. This court will not
 5. go beyond appellant's brief in quest of error to reverse the judgment below. *State, ex rel. v. Board, etc.* (1906), 167 Ind. 276, 287, 288, 78 N. E. 1016; *Emerson v. Opp* (1894), 9 Ind. App. 581, 587, 34 N. E. 840, 37 N. E. 24.

Judgment affirmed.

NOTE.—Reported in 104 N. E. 97. As to the scope and effect of writs of error, see 91 Am. Dec. 193. As to the review of a chancery decree for costs only, see 6 Ann. Cas. 100. See, also, under (1) 2 Cyc. 593; (2) 2 Cyc. 1013; (3) 3 Cyc. 388; (4) 14 Cyc. 1033-1035; (5) 2 Cyc. 1014.

AMERICAN SAND AND GRAVEL COMPANY v. SPENCER.

[No. 8,066. Filed December 12, 1913. Rehearing denied February 20, 1914.]

1. TRESPASS.—*Trespass to Land*.—"Innocent Trespasser".—"Wilful Trespasser".—One who unlawfully, but inadvertently or unintentionally, and in the honest and reasonable belief that he is exercising his own right, enters upon the lands of another and removes therefrom sand or other minerals, or cuts and removes therefrom growing timber, is an "innocent trespasser"; and one who unlawfully enters, recklessly or wilfully, or with an actual intent to do so, and removes any such substance is a "wilful trespasser". p. 527.
2. APPEAL.—*Review*.—*Findings*.—In reviewing the action of the trial court for the purpose of determining whether there was

error in assessing the amount of damages, only such evidence as tends to sustain the finding of the trial court can be considered. p. 528.

3. **TRESPASS.—Wilful Trespass.—Evidence.**—Evidence that defendant entered upon the land of plaintiff, without plaintiff's consent, and removed sand therefrom, knowing at the time that the land belonged to plaintiff, was sufficient to support a finding of wilful trespass, though defendant's evidence showed that notwithstanding its knowledge of the facts it believed it had a right to remove such sand, since knowledge of the facts requires a presumption that the law applicable thereto is also known. p. 528.
4. **TRESPASS.—Trespass to Land.—Trespass De Bonis Asportatis.**—An action to recover the value as personal property of sand taken and removed from plaintiff's land by defendant, where no damages were sought for injury to the land caused by defendant's acts, is in the nature of trespass *de bonis asportatis*, rather than trespass *quare clausum fregit*. p. 529.
5. **TRESPASS.—Trespass De Bonis Asportatis.—Innocent Trespass.—Measure of Damages.**—In an action to recover the value of mineral substance wrongfully taken from the land of plaintiff, where the trespass was innocent, and trespass to the land, as such, is not involved, the proper measure of damages is the value of the substance at the time and place where the trespasser converted it to his own use, less the amount such value was enhanced by his labor and expense. p. 529.
6. **TRESPASS.—Trespass De Bonis Asportatis.—Wilful Trespass.—Measure of Damages.**—In an action to recover the value of sand wrongfully taken from the land of plaintiff, where trespass to the land, as such, is not involved, and the trespass complained of is within the class denominated as wilful, the measure of damages is the value of the sand at the time and place of the conversion, or the highest market price at any time between the severance and the conversion, deducting nothing on account of labor or expense. p. 530.
7. **TRESPASS.—Trespass De Bonis Asportatis.—Time and Place of Conversion.**—The time and place of the conversion of any substance, such as sand or mineral, taken from the land of another, vary with the circumstances of each case, and may be the time and place of demand, or of sale, or of the consummation of the conversion by the removal of the substance from the owner's land. p. 531.
8. **TRESPASS.—Excessive Damages.—Trespass De Bonis Asportatis.**—In an action for the value of sand wilfully taken from plaintiff's land without her consent, under evidence showing that it was worth fifteen cents a cubic yard on cars at the pit, that the cost of loading was from four to five cents per cubic yard, that

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the freight to the place of sale averaged twenty cents per cubic yard, that it sold for from thirty-five to fifty cents per cubic yard, and that at least 31,717 cubic yards of sand were thus taken and sold by defendant, a judgment for \$3,698.15 was not excessive. p. 532.

9. DAMAGES.—*Exemplary Damages.—Determination.*—Exemplary damages is a sum assessed in addition to compensatory damages, and the amount that may be assessed as exemplary damages rests in the sound discretion of the jury, or of the court where the court tries the facts. p. 532.

From Lake Circuit Court; *Willis C. McMahan*, Judge.

Action by Eva Spencer against the American Sand and Gravel Company and another. From a judgment against it, the American Sand and Gravel Company appeals. *Affirmed.*

Edwin C. Crawford, for appellant.

Harris, Bretsch & Ressler, Frank B. Pattee and *Louis B. Ewbank*, for appellee.

CALDWELL, J.—It appears from the record that from June 1, to August 8, 1908, William Tipton was the owner of fifty acres of land, described in the complaint, situate near the city of Gary, in Lake County, Indiana. At the last named date, William Tipton died intestate, leaving as his only heirs at law, his widow Melissa Tipton and his daughter, the appellee, Eva Spencer. Melissa Tipton died intestate September 21, 1908, leaving appellee as her only heir at law, who thereupon became sole owner of the lands, and so continued to the time of the trial. The land contained extensive deposits of sand. Originally three suits were filed in the court below against appellant and The Garden City Sand and Gravel Company, one by the administrator of the estate of William Tipton, one by the administrator of the estate of Melissa Tipton, and one by appellee, to recover for sand alleged to have been wrongfully taken by the defendants, within the respective periods when William Tipton owned the land, and when Melissa Tipton and appellee owned it in common, and when appellee was sole owner

thereof respectively. It being conceded that appellee was the beneficial owner of each of the claims sued on, the three actions were consolidated by agreement of the parties, and appellee filed a new complaint in the consolidated cause, on which complaint, the trial was had. By agreement, it was stipulated of record that if any judgment should be rendered in the consolidated action against defendants, it should be *in solido* in favor of appellee.

The material averments of the complaint are in substance as follows: That defendants are engaged in the business of buying and selling sand and gravel; that appellee between certain specified dates owned a fifty-acre tract of land, described in the complaint; that at divers times between said times "the exact times being unknown to this plaintiff, said defendants wrongfully broke and entered said land of the plaintiff and wrongfully took and carried away large quantities of sand and gravel from said real estate of this plaintiff, amounting to 1,000 or more cars, of the value of \$20,000; that said acts of trespass were committed without the consent of the plaintiff, and without authority by law; that defendants well knew at the time of so entering upon plaintiff's real estate that they were upon the same without authority; that they had endeavored to purchase said land, but failed, but notwithstanding all this, they unlawfully, intentionally and wilfully entered said premises and took and carried away as above averred the sand and gravel of this plaintiff, to her damage as averred." Defendants filed an answer in general denial. Trial by the court, without a jury. Finding and judgment for costs in favor of the defendant, The Garden City Sand and Gravel Company, and in favor of appellee, against appellant in the sum of \$3,698.15, from which appellant prosecutes this appeal. The sole error assigned is the overruling of the motion for a new trial, which motion presents the single question of whether the damages assessed are excessive.

Under the averments of the complaint, appellee seeks

to recover as damages only the value of the sand and gravel taken and removed, as measured by the rules of law applicable to such a case as is made by the complaint. There is no averment of any consequent injury to the land, as such, and appellee does not seek to recover for any such injury.

In cases where one person unlawfully enters upon the land of another person, and mines and removes therefrom coal, stone, sand or other minerals, or cuts and re-

1. moves therefrom growing timber, and converts such material or substance to his own use, the circumstances may be such as that the person who so enters the lands of another may thereby become either an innocent, inadvertent trespasser, or a wilful trespasser. If such a person enters his neighbor's land unlawfully, but inadvertently or unintentionally, or in the honest, reasonable belief that he is exercising his own right, and in such a spirit displaces and removes therefrom any of said substances or any like substance, he is classed as an innocent trespasser; but where he enters such land, not only unlawfully, but also recklessly or wilfully, or with an actual intent to do so, and in such spirit displaces and removes any substance aforesaid, he is classed as a wilful trespasser. The complaint charges defendants with a wilful trespass. *Sunnyside Coal, etc., Co. v. Reitz* (1896), 14 Ind. App. 478, 497, 39 N. E. 541, 43 N. E. 46; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* (1904), 129 Fed. 668, 679, 64 C. C. A. 180; 27 Cyc. 639.

In ascertaining the correct measure of damages in this case, the trial court presumably first determined whether appellant was a wilful trespasser. The amount of the judgment indicates that the court found against appellant on that proposition. That there was a trespass is not controverted. The contest wages around the question of its nature. It became necessary for the trial court to ascertain the facts of the trespass, and from such facts to determine whether it was innocent or wilful. Such question is so related to the

rules by which the damages are measured that we are

2. required to review the trial court's action in this respect in order that we may determine whether there was any error in assessing the amount of damages. In so reviewing the trial court's action, only the evidence that tends to sustain the finding of the trial court can be considered by this court. There was evidence to the following effect: during the period in which appellant was

3. removing the sand, William and Melissa Tipton, until they died as aforesaid, and appellee throughout the period, lived at Kenosha, Wisconsin. There was evidence that they did not know that appellant was mining and removing the sand. Appellee first learned the fact about July 1, 1909, and at once notified appellant to cease operations and to remove its equipment from the land. Appellant admitted receiving such notice, and while it did not promptly vacate the land, claims that thereafter it took no more of the sand. Appellant negotiated with William Tipton in his lifetime for the right to take sand, and with appellee thereafter, but the parties arrived at no agreement to that end. There was evidence that appellant, through its officers and agents knew of the death of William Tipton soon after that event occurred. While William Tipton was living, but comparatively a small amount of sand was taken, and this without any agreement that it might be taken. No sand was taken in the three months following the death of William Tipton. Thereafter, and up to July 1, 1909, appellant took 740 car loads, 579 of which were taken before there were any negotiations with the heirs of William Tipton, and 161 after negotiations had been opened and failed. Appellant admits that up to July 1, 1909, it took 809 car loads, amounting to 31,717 cubic yards. There was some evidence that appellant took 626 cubic yards after July 1, 1909, but this was denied by appellant. Appellant knew at all times that it was taking the sand from the Tipton land, and intended to take it from the land, but through

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its officers claimed that it believed that it had the right to do so. Appellant was fully informed as to the facts, and is presumed to know the law applicable thereto. The evidence is sufficient to sustain a finding that appellant wilfully took the sand, and that in so doing it was a wilful and intentional trespasser. *Sunnyside Coal, etc., Co. v. Reitz, supra; Resurrection Gold Min. Co. v. Fortune Gold Min. Co., supra; Whiting v. Adams* (1894), 66 Vt. 679, 30 Atl. 32, 25 L. R. A. 598, 44 Am. St. 875; 27 Cyc. 639.

We next proceed to determine the rule by which the damages must be assessed. It should be kept in mind that this action, under the allegations of the complaint is

4. in the nature of trespass *de bonis asportatis*, rather than trespass *quare clausum fregit*. Any damages to the land as such, caused by the removal of the sand, are waived or ignored, under the allegations of the complaint. Appellee seeks to recover only the value of the sand as such, when measured by the rules of law that must be applied to a case of this kind. The sand in its natural position on the land was a part of the real estate. When mined and removed from the place, it became personal property, and appellee seeks to recover its value as personal property. Our further discussion of this case must be construed with the foregoing.

It is sometimes said that the measure of damage in a case of what we have denominated an innocent trespass—that is, where one wrongfully takes a mineral substance

5. from the lands of another, through inadvertence or mistake, or in the honest, reasonable belief that he is acting within his legal rights—is the value of such substance *in situ*. It would seem, however, that such a rule should be applied to a case where the action involves a trespass to the land, as such, rather than to a case involving only the value of the product taken and removed. The rule is otherwise stated to the effect that the measure of

damages is the value of the substance at the time and place where the trespasser converts it to his own use, less what the labor and expense of the trespasser has added to such value. The latter statement of the rule seems more nearly to conform to the nature of the action under discussion, where the trespass is an innocent one, and such seems to be the rule in this State. *Sunnyside Coal, etc., Co. v. Reitz, supra*; *White v. Yawkey* (1895), 108 Ala. 270, 19 South. 360, 32 L. R. A. 199, 54 Am. St. 159; *Bolles Woodenware Co. v. United States* (1882), 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co., supra*; *United States v. Ute Coal & Coke Co.* (1907), 158 Fed. 20, 85 C. C. A. 302; *Ball & Bro. Lumber Co. v. Simms Lumber Co.* (1908), 121 La. 627, 46 South. 674, 18 L. R. A. (N. S.) 244; *Gaskins v. Davis* (1894), 115 N. C. 85, 20 S. E. 188, 25 L. R. A. 813, 44 Am. St. 439; *Illinois, etc., R. Co. v. Ogle* (1876), 82 Ill. 627, 25 Am. Rep. 342; *United States v. Homestake Min. Co.* (1892), 117 Fed. 481, 54 C. C. A. 303; *United States v. Northern Pac. R. Co.* (1895), 67 Fed. 890; *Bailey v. Chicago, etc., R. Co.* (1893), 19 L. R. A. 653, note.

In a case of what we have denominated a wilful trespass, that is, where one recklessly, wilfully or intentionally takes a mineral substance from the lands of another—the

6. courts are not in entire accord, respecting the rule for measuring the damages. Thus, some courts measure the damages by the value of the substance as personal property, when it first becomes such by mining or severing, deducting nothing for the labor and expense of mining or severing. This rule has been applied to coal stacked or loaded on cars at the mouth of a mine, but deducting the expense of transporting to the mouth of such mine or to such cars, since such expense was incurred after the coal had become personal property. *Donovan v. Consolidated Coal Co.* (1900), 187 Ill. 28, 58 N. E. 290, 79 Am. St. 206; *Illinois, etc., R. Co. v. Ogle, supra*; *Illinois, etc., R. Co. v.*

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Ogle (1879), 92 Ill. 353; *Omaha, etc., Refining Co. v. Tabor* (1889), 13 Colo. 41, 21 Pac. 925, 5 L. R. A. 236, 16 Am. St. 185. A more stringent rule has been applied, and such seems to be the rule in this State, to the effect that where the trespass is wilfully or intentionally committed, the damages should be measured by the value of the substance severed or removed at the time and place of the conversion, or the highest market price of such substance at any time between the severance and the conversion, deducting nothing on account of labor and expense, and this rule has been applied where the property has been transported to a distant point, and is there finally converted to the use of the trespasser. *Sunnyside Coal, etc., Co. v. Reitz, supra*; *Ellis v. Wire* (1870), 33 Ind. 127, 5 Am. Rep. 189; *Everson v. Seller* (1886), 105 Ind. 266, 4 N. E. 854; *Ayers v. Hobbs* (1908), 41 Ind. App. 576, 84 N. E. 554; *Windstanley v. Second Nat. Bank* (1895), 13 Ind. App. 544, 41 N. E. 956; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co., supra*; *Bolles Woodenware Co. v. United States, supra*; *Meloon v. Read* (1905), 73 N. H. 153, 59 Atl. 946; *Central Coal, etc., Co. v. Henry Shoe Co.* (1901), 69 Ark. 302, 63 S. W. 49; *Ball & Bro. Lumber Co. v. Simms Lumber Co., supra*; *United States v. Heilner* (1886), 26 Fed. 80; *Bailey v. Chicago, etc., R. Co.* (1893), 3 S. Dak. 531.

The time and place of the conversion vary with the particular circumstances of each case. Thus, the time and place of demand, or of sale, or of the consummation

7. of the conversion, by the removal of the substance from the owner's land are respectively held to be the time and place of conversion. *Bolles Woodenware Co. v. United State, supra*; *Mississippi River Logging Co. v. Page* (1897), 68 Minn. 269, 71 N. W. 4; *Whiting v. Adams, supra*; *Anderson v. Besser* (1902), 131 Mich. 481, 91 N. W. 737; *Winchester v. Craig* (1876), 33 Mich. 205; *Wright & Co. v. Skinner* (1894), 34 Fla. 453, 16 South. 335.

As we have said, it was admitted by appellant that it

took from the lands 31,717 cubic yards of sand. There was evidence that it took 626 cubic yards in addition.

8. The sand was loaded onto cars at the pit, by the use of a steam shovel. There was evidence that the sand was worth fifteen cents per cubic yard on the cars at the pit, and that the expense of mining and loading was four cents per cubic yard, and some evidence that it was worth five cents per cubic yard. The evidence showed that all this sand was shipped to Chicago and there sold, and that on the siding at Chicago, it was worth from thirty-five cents to fifty cents per cubic yard, and that the average value was about forty-two cents, and the freight rate from the lands to Chicago was from eighteen cents to twenty-two and one-half cents per cubic yard, or on an average of about twenty cents per cubic yard. The judgment is in the sum of \$3,698.15. 31,717 cubic yards at 11 cents, adding one year's interest at six per cent, amounts to \$3,698.20, or five cents in excess of the judgment. Under the mildest of the foregoing rules for measuring the damages in case of a wilful trespasser, it is evident that the judgment is not excessive.

Appellant insists that the trial court evidently assessed exemplary damages against it, and that in so doing the court erred. A sum assessed as exemplary damages

9. is a sum in addition to compensatory damages. The amount of compensatory damages in a given case is determined by recourse to rules of law for measuring damages, while the amount of exemplary damages, where such damages may be assessed, rests in the sound discretion of the jury, guided by proper instructions given by the court, or in the sound discretion of the court, where the court tries the facts. It is evident from what we have said, that we have considered the question of the amount of the judgment in this case only from the standpoint of compensatory damages.

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There being no error in the record, the judgment is affirmed.

NOTE.—Reported in 103 N. E. 426. As to the measure of damages for unintentional trespass where property has been carried off premises, see 54 Am. Rep. 421. As to the measure of damages for the wrongful working of a mine, see 8 Ann. Cas. 43; Ann. Cas. 1913 A 562. See, also, under (1) 38 Cyc. 1002; (2) 3 Cyc. 360; (3) 38 Cyc. 1116; (4) 38 Cyc. 1072, 1073; (5) 38 Cyc. 1133, 1141; (6) 38 Cyc. 1133; (7) 38 Cyc. 2032; (8) 38 Cyc. 1147; (9) 13 Cyc. 105, 119.

CINCINNATI, RICHMOND AND FORT WAYNE RAILROAD COMPANY v. WAYNE TOWNSHIP, JAY COUNTY.

[No. 8,082. Filed October 7, 1913. Rehearing denied February 20, 1914.]

1. **TAXATION.—Recovery of Taxes Paid.—Voluntary Payment Under Protest.**—In the absence of statutory authority therefor, there can be no recovery of taxes voluntarily paid, even though paid under protest. p. 537.
2. **TAXATION.—Recovery of Taxes Paid.—Complaint.—Excessive Tax.**—Where tax in aid of railroad construction was levied in excess of the amount authorized, a complaint for the recovery of the tax thus levied upon plaintiff's property, which proceeded on the theory that the entire tax was invalid, and averred that plaintiff had paid the entire amount on compulsion and under protest, was insufficient, even if a recovery of the amount in excess of the authorized amount could be had, in the absence of allegations that plaintiff offered to pay the portion represented by a correct per centum of levy, or that the officer threatened to levy and sell his property for such excess alone. (*DuBois v. Board, etc.* [1894], 10 Ind. App. 347; *Board, etc. v. Senn* [1889], 117 Ind. 410; and *Eranville, etc., R. Co. v. Hays* [1889], 118 Ind. 214, distinguished.) p. 537.
3. **TAXATION.—Excessive Levy.—Validity.**—A levy for taxes in aid of railroad construction is not invalid from the fact that the per centum fixed will produce an amount in excess of the amount of taxes authorized, where such excess as to each taxpayer's property is so small as to come within the maxim *de minimis non curat lex*, and especially in view of the language of §9577 Burns 1908, Acts 1899 p. 117, which seems to contemplate that a levy of taxes in such cases may necessarily result in an excess fund. p. 539.

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4. **TAXATION.—Recovery of Taxes Paid.—Statutes.—Sufficiency of Complaint.**—A complaint to recover from a township taxes paid by plaintiff in aid of railroad construction, which shows no demand of, or application to the board of county commissioners by claim or otherwise while such taxes were in the hands of the county treasurer, but which shows that the same were paid over to the township trustee, does not state a cause of action within the provisions of §6088 Burns 1908, §5813 R. S. 1881, authorizing the refund out of the county treasury of taxes wrongfully paid, so far as the same were assessed and paid for county taxes. p. 541.
5. **TAXATION.—Penalties for Nonpayment.—Statutes.—Tax in Aid of Railroads.**—Under §5476 Burns 1908, §4056 R. S. 1881, providing that taxes in aid of railroad construction are to be collected as other taxes are collected, the collection of the penalty for delinquency provided by §10321 Burns 1908, Acts 1897 p. 162, is authorized in case of delinquency in the payment of such tax. p. 541.
6. **TAXATION.—Penalties for Nonpayment.—Recovery of Penalties Paid.—Complaint.**—A penalty collected for delinquency in the payment of tax in aid of railroad construction, even if unauthorized, cannot be recovered on a complaint which does not show that the payment of such penalty was procured by fraud, or by mistake of fact, or that it was an involuntary payment within the meaning of the law. p. 543.

From Jay Circuit Court; *John F. LaFollette*, Judge.

Action by The Cincinnati, Richmond and Fort Wayne Railroad Company against Wayne Township, Jay County. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Roscoe D. Wheat, for appellant.

Charles E. Schwartz and *John M. Smith*, for appellee.

HOTTEL, P. J.—This is an action brought by appellant in the court below to recover from the appellee, taxes and penalty which it had paid under protest on a railroad aid subsidy. The complaint is in two paragraphs, a demurrer to each of which was sustained.

The appellant stood on its complaint and appeals, and by proper assignment of error in this court presents the question of the ruling of the trial court on the demurrer to each paragraph of the complaint.

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These paragraphs are lengthy and each avers, in detail, facts showing that the Cincinnati, Bluffton, etc., Railroad Company took the usual and necessary steps to procure an election in Wayne Township, Jay County, Indiana, which resulted in such township voting an appropriation of \$54,500 to aid in the construction of such railroad and that the board of commissioners of said county at their regular June session, 1903, made an order (we quote from the complaint) "that the sum of \$54,500 be levied upon the taxable property in said township, * * * the same not to exceed two per cent of the assessed valuation of all taxable property in said township, and the auditor of said county was directed to place the same upon the tax duplicate of said township for the years 1904 and 1905, to be collected as other taxes were collected in said county and state, one-half to be placed upon the duplicate of 1904 and one-half upon the duplicate of 1905"; that the total valuation of all the property in said township, including the city of Portland located therein, as shown by the tax duplicates of such township and city for the years 1904 and 1905 amounted to a sum total of \$6,180,844. The other averments of the complaint, important for the purpose of determining the questions here involved, are in substance as follows: After the regular June session, 1904, of said board of commissioners, the auditor of said county, made and prepared a levy of one per cent for the purpose of raising said appropriation of \$54,500 for the years 1904 and 1905 and certified the same to the treasurer of Jay County and placed said duplicates and said levy of taxes in the hands of the treasurer to be collected. Such levy so made by the auditor was erroneous, wrongful, excessive and illegal, in that it created a fund greatly in excess of the aid voted by the voters of said township and ordered by said board of commissioners. The appellant had property in said township valued for taxation in the year 1904 at \$64,525, and valued for the year 1905 at \$62,205, on which said auditor erroneously,

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wrongfully, excessively and illegally levied a tax of one per cent and certified the same to the treasurer of said county, to be collected and applied to said appropriation. On August 3, 1908, the \$54,500 aid voted said railroad company by said township, had been collected by the treasurer of said county and had been paid over and said aid so voted had been fully paid and satisfied. On December 11, 1909, the treasurer of Jay County, Indiana, demanded of appellant that it pay the one per cent of taxes so levied on its property in Wayne Township for the years 1904 and 1905 together with the interest and penalties which said treasurer had added and taxed thereto and "threatened, in the event the same was not paid, to levy upon the property of said plaintiff and to sell the same to pay and satisfy said taxes". To prevent such levy and sale, appellant, on June 15, 1910, paid said treasurer "under protest involuntarily and under duress" the sum of \$2,788.10, the amount demanded by him to pay and satisfy said taxes, interest and penalties, and said treasurer then noted on the tax duplicate the fact that such tax, interest and penalty were paid under protest. On June 15, 1910, such treasurer, paid the \$2,788.10 so collected from appellant to Peter Mellinger, trustee of said township, who, as such trustee, placed the same in the general fund of such township, and no part of such tax so levied and collected from appellant was paid to said Cincinnati, Bluffton, etc., Railroad Company. Before bringing this action, appellant presented to said Mellinger, trustee, a statement of said taxes and demanded of such trustee that he pay appellant and reimburse it for said sum so erroneously, wrongfully, excessively and illegally collected, which such trustee neglected and refused to do, and said sum with interest from June 15, 1910, is due appellant. Judgment for \$3,000 is prayed.

The second paragraph differs from the first in that it seeks to recover only the penalty paid by appellant and the averments on the subject of the demand are correspondingly

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changed. Such averments are in substance as follows: Said treasurer demanded of appellant that it pay the taxes, to wit, \$2,534.60 levied against its property in said township, to aid in the construction of said railroad, and also demanded that it pay a penalty and interest in the sum of \$263.50 which said treasurer had wrongfully, excessively and unlawfully added to said taxes. Appellant demanded of the trustee of said township said sum of \$263.50 interest and penalties, and said sum is due appellant from appellee with interest thereon from June 15, 1910. Judgment is asked for \$300. In other respects, the averments of the two paragraphs are substantially if not identically the same.

Appellant does not indicate whether it bases its right to recover on the common law or on some provision of the statute. We will therefore consider first whether the complaint states a cause of action under the common law.

1. "It has long been the rule in this State that there can be no recovery for taxes voluntarily paid, even though paid under protest unless there is a statute authorizing such recovery." *Durham v. Board, etc.* (1884), 95 Ind. 182, 183, and authorities there cited; see, also, *Board, etc. v. Graham* (1884), 98 Ind. 279, 280; *Board, etc. v. Murphy* (1885), 100 Ind. 570, 573; *Nyce v. Schmoll* (1907), 40 Ind. App. 555, 559, 82 N. E. 539; *Simonson v. Town of West Harrison* (1892), 5 Ind. App. 459, 465, 467, 32 N. E. 585.

It is not claimed by appellant that this tax was paid through mistake of fact, but the effect of its contention seems to be that the *entire tax* levied on appellant's

2. property *was void*, for the reason that the auditor in making the levy in compliance with the order of the board of commissioners fixed a per centum for raising such taxes which created a larger fund than was necessary to meet the appropriation voted, and ordered by the board of commissioners, and that appellant paid such taxes under compulsion. Appellant cites in support of its contention,

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the cases of *Du Bois v. Board, etc.* (1894), 10 Ind. App. 347, 37 N. E. 1056; *Board, etc. v. Senn* (1889), 117 Ind. 410, 20 N. E. 276; and *Evansville, etc., R. Co. v. Hays* (1889), 118 Ind. 214, 20 N. E. 736. These cases are easily distinguishable from the case at bar. In the case of *Board, etc. v. Senn, supra*, the auditor increased the valuation of real estate after the proper authorities had fixed and returned such valuation and the taxpayer in that case paid his assessment and only sought to recover the excess under §5813 R. S. 1881, §6088 Burns 1908. The complaint in that case also averred that the assessment made by the auditor had been adjudged illegal and wrongful in a proper proceeding theretofore instituted. The court very properly held that such excess of taxes *was recoverable under said §5813 R. S. 1881, supra*. The holding in the case of *Du Bois v. Board, etc., supra*, in so far as it relates to any question here involved, is to the effect only that the fact that taxes were *voluntarily* paid, constitutes no defense to its recovery *under §5813 R. S. 1881, §6088 Burns 1908*, and the further fact that the distribution of the taxes by the county to the state and town authorities *after proper legal proceeding to recover such tax had been filed before the board of commissioners*, would not operate to defeat collection of such taxes from the county; that, *in such a case*, the county made the distribution at its risk and the taxpayer was not required to pursue the fund. The case of *Evansville, etc., R. Co. v. Hays*, expressly recognizes that in a suit by the taxpayer, to recover back taxes which he had paid, the rule to be applied differs from that to be applied to a suit brought by the taxing officer to recover the tax in the first instance. If we should give appellant the benefit of its contention to the extent of holding that the excess of taxes in this case was invalid, it would not help appellant, because his complaint does not proceed on the theory that such excess alone was invalid and paid under duress, but on the contrary, proceeds on the theory that the entire tax was

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invalid, and avers that the protest was against the payment of the entire tax and not against the excess alone, and that the threat of the treasurer to levy and sell appellant's property was a threat to sell the property to satisfy the entire tax. There is no averment that appellant offered to pay that portion of his tax represented by a correct per centum of levy, or that the auditor threatened to levy and sell his property for such excess alone.

In the case of *Lima Tp. v. Jenks* (1863), 20 Ind. 301, cited by appellant as supporting its contention that its payment of this tax is shown by the averments of the complaint to have been involuntary, the court said at page 303: "An illegal tax voluntarily paid can not be recovered back, and to make the payment of such illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party from detention, or to prevent a seizure of either by the other party, having apparent authority to do so, without resorting to an action at law." To the same effect see, *City of Indianapolis v. Vajen* (1887), 111 Ind. 240, 246, 12 N. E. 311; *Simonson v. Town of West Harrison*, *supra*, 466, 467, and authorities there cited. We should remark in this connection

3. that it is questionable whether, under the facts here pleaded, any part of the tax levied against appellant's property was without authority of law and void. In the case of *Mustard v. Hoppess* (1879), 69 Ind. 324, after quoting the order made by the board of commissioners in that case, which is, in effect, the same as the order made by the board in this case, in so far as it affects the question here involved, the court at page 335, said: "The amount of the appropriation was within the limits fixed by law, but it is claimed that the above orders of the board did not amount to a levying of the tax; that the board should have specified the *per centum* to be levied on the taxable property. We think there is no force in the objection. The orders sufficiently levied the tax. *It was mere*

clerkship for the auditor to calculate the proper per centum, and place the same upon the tax duplicate.” (Our italics.) In the case of *Faris v. Reynolds* (1880), 70 Ind. 359, a case very similar in its facts to the one at bar, the court at page 365 said: “It is claimed that the taxes levied amount to more than the \$24,400. The board ordered one per cent upon the taxable property to be placed upon the tax duplicate for the year 1874, and a like amount for the year 1875. The two per cent upon the taxable property of the township, thus levied, would, *if all were collected*, produce a sum slightly in excess of the \$24,400, the amount of the taxables being a little more than enough to produce, at the two per cent, the sum of \$24,400. *The tax was valid so far as was necessary to produce the sum of \$24,400.* [Our italics.] The trifling excess *may not have been valid*, but the case comes clearly within the rule that payment or tender must be made of the portion of taxes that are legal, in order that an injunction will be granted to restrain the collection of such portion as may be illegal. The case is entirely different from one in which the amount of aid asked, exceeds the two per cent on the amount of taxables. Besides, the excess on each taxpayer’s property is so infinitesimal as to come within the maxim, *de minimis non curat lex.*”

Section 9577 Burns 1908, Acts 1899 p. 117, makes it the duty of the county treasurer to pay over any unexpended balance in his hands arising from appropriations for railroad and other purposes named therein to the township trustee to be placed in the general funds of the township. So it seems that the authorities have recognized and that the statute *now* contemplates, that there may be a levy of taxes in cases of the kind here involved which may necessarily result in an excess fund. We do not mean to say that if an auditor, by an excessive per centum, attempted to levy and collect a tax clearly beyond the amount voted for as expressed in the order of levy made by the board of

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commissioners, that a taxpayer would not, at the proper time in the proper way have a remedy against such excessive levy, but certainly not at a time and in the manner here attempted.

We next inquire whether the complaint states a cause of action within the provision of any statute of this State.

As applicable to this branch of the case we quote

4. from the case of *Durham v. Board, etc.* (1884), 95

Ind. 182, 183: "An elementary rule is, that one who founds a right of action on a statute must make a case within its terms. This the appellant has not done. In order to make a case within the statute, it must be shown, not only that the special assessment was made by an unauthorized person, and in an irregular manner, but also that the property upon which the taxes were laid was not justly subject to the assessment. It is not enough to show that the special assessment was irregular and unauthorized, for it must also be shown that the taxes were unjustly levied. A man can not evade the payment of taxes justly chargeable against him by showing that the wrong person made the assessment. This subject is so well and thoroughly discussed in the opinion of Niblack, J., in *Board, etc. v. Armstrong* [1883], 91 Ind. 528, that further discussion is unnecessary." See, also, *Board, etc. v. Graham* (1884), 98 Ind. 279, 280; *Board, etc. v. Murphy, supra*, 573, 574; *Hilgenberg v. Board, etc.* (1886), 107 Ind. 494, 495, 496, 8 N. E. 294; *Board, etc. v. First Nat. Bank* (1900), 25 Ind. App. 94, 95, 57 N. E. 728; *Simonson v. Town of West Harrison, supra*; *Nyce v. Schmoll, supra*.

Appellant has not cited any statute upon which he predicates his right to recover, but cites authorities which recognize §5813 R. S. 1881, §6088 Burns 1908, as being applicable to such cases. The cases relied on are so different in their facts that they can have no influence in the case at bar. The case at bar is against the township. The complaint shows no demand of, or application to the board of

county commissioners by claim or otherwise while such taxes were in the hands of the county treasurer or before the filing of the suit herein, but on the contrary, shows that when this action was begun, the taxes sought to be recovered had been paid over to the trustee of the township to be by him turned into the general fund of such township under §9577 Burns 1908, Acts 1899 p. 117. This showing defeats recovery under §6088 Burns 1908, §5813 R. S. 1881. *Cleveland, etc., R. Co. v. Board, etc.* (1898), 19 Ind. App. 58, 67, 68, 49 N. E. 51, and authorities there cited. This section has no application whatever to cases like the one here presented, but such section authorizes a refund out of the county treasury of taxes collected by the county treasurer “so far as the same was assessed and paid for county taxes”, where the proper person appears before the board of commissioners of the county where such taxes were collected and makes the proper proof as provided in such section. The authorities herein cited make it clear that the facts pleaded by appellant in his first paragraph of complaint fail to show a cause of action either under the common law or under any statute authorizing the refunding of taxes. Hence the demurrer thereto was properly sustained.

We now inquire whether the second paragraph of complaint states a cause of action. As part of the law to enforce the collection of taxes, §10321 Burns 1908, 5. Acts 1897 p. 162, provides among other things a penalty to be added to taxes when they become delinquent. Section 5476 Burns 1908, §4056 R. S. 1881, provides in effect that taxes of the character here involved are to be collected *as other taxes are collected* and in case of default of payment when due they become delinquent the same as other taxes. This provision of §5476, *supra*, carries into it the penalty provision of §10321, *supra*, above indicated and places the penalty on the same footing with the original taxes upon which it is assessed, and hence the law which prevents a recovery of the taxes paid, likewise

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prevents a recovery of the penalty assessed thereon. *State, ex rel. v. Laughlin* (1885), 101 Ind. 29, 35. If, however, it should be conceded that the penalty could not have been collected in the first instance, appellant must fail in this action, because no statute authorizes recovery under the facts here pleaded, and the payment of the penalty by the averments of the complaint, is not shown to have been procured by fraud or mistake of fact or to have been involuntary within the meaning of the law as declared in the authorities herein cited.

Judgment affirmed.

NOTE.—Reported in 102 N. E. 865. As to recovery by taxpayer of taxes paid, see 22 Am. Rep. 519; 45 Am. Dec. 164; 94 Am St. 425. As to the necessity and sufficiency of grounds in notice of protest required as condition of recovering back payment of an unlawful tax, see 36 L. R. A. (N. S.) 476. On the right to resort to court to recover taxes paid on erroneous or excessive assessments without previous resort to statutory remedies, see 16 L. R. A. (N. S.) 675. As to the recovery of an illegal tax paid "under protest", see 8 Ann. Cas. 669; 10 Ann. Cas. 1050. See, also, under (1) 37 Cyc. 1178; (2, 4) 37 Cyc. 1188; (3) 37 Cyc. 763; (5) 37 Cyc. 1542; (6) 37 Cyc. 1174.

INDIANAPOLIS TRACTION AND TERMINAL COMPANY v. CROLY.

[No. 8,201. Filed February 25, 1914.]

1. STREET RAILROADS.—*Injuries to Persons on Tracks.—Last Clear Chance.—Instructions.—Harmless Error.*—In an action for injuries to a child while crossing a street car track, an instruction on the doctrine of last clear chance, though erroneous in stating that plaintiff would be entitled to recover if the motorman by reasonable care on his part could have known that the child was in danger in time to stop the car and avoid the injury, and failed to do so, was harmless in view of such motorman's undisputed testimony that he saw the child. p. 545.
2. DAMAGES.—*Injury to Child.—Loss of Service.*—In an action by a parent for injuries to his child, the measure of damages is the value of any services which the evidence shows that plaintiff has lost and will probably lose during the minority of the child

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as a result of such injuries, or any diminution of the value of such services which the evidence shows has resulted or will probably result therefrom during such period, less the reasonable cost of its support and maintenance. p. 545.

From Superior Court of Marion County (79,211) ; *Vinson Carter*, Judge.

Action by Joseph Croly against the Indianapolis Traction and Terminal Company. From a judgment for plaintiff, the defendant appeals. *Reversed*.

F. Winter, M. E. Foley and W. H. Latta, for appellant.
George W. Galvin, for appellee.

HOTTEL, J.—This is an appeal from a judgment recovered by appellee in an action brought by him for damages against appellant on account of an injury to a minor child of appellee, alleged to have been caused by appellant's negligence. A trial by jury resulted in a verdict in appellee's favor for \$600. Appellant's motion for a new trial was overruled and exceptions properly saved. This ruling is assigned as error and relied on for reversal.

The present case grows out of the same occurrence as that involved in the case of *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 96 N. E. 973, and it is insisted by appellant, on the authority of that case, that the evidence in the present case shows that appellee's child was guilty of contributory negligence as a matter of law. We think the evidence in this case shows some facts pertinent to this question in appellee's favor not so clearly and certainly disclosed by the evidence in the other case, but, in view of the conclusion we have reached on other questions presented by the appeal, and for the reason that the evidence on another trial of the case may not be the same as here presented we deem it unnecessary to indicate any opinion as to its present sufficiency in the respect mentioned. For the same reason we need not indicate any opinion as to the correctness of instruction No. 9, the only objection to it

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being, that it submitted to the jury such question of contributory negligence, whereas, under the facts of this case, the court should have instructed that such child was guilty of such negligence.

The latter part of instruction No. 10, which was an attempt to instruct the jury on the doctrine of last clear chance, told it "if you should also find that said child, when she became in a place of danger, was uncon-

1. scious or unaware of her danger, and that said [defendant] motorman, either knew, *or, by reasonable care on his part could have known* that said child was in danger and was unaware of her danger, in time to have stopped the car and avoided injuring said child, but failed to do so * * * then the plaintiff would be entitled to recover, notwithstanding she was negligent in going on the tracks", etc. (Our italics.) The words italicized, and a repetition of words of similar import in another clause of the instruction, are objected to by appellant. It is insisted, *and correctly we think*, that in the respect indicated this instruction does not correctly state the doctrine of last clear chance as expressed in the case of *Indianapolis Traction, etc., Co. v. Croly, supra*. While the instruction is erroneous in such respect, we think, in view of the undisputed evidence of the motorman that he did see appellee's child, appellant could not have been harmed by the giving thereof. *Indianapolis Traction, etc., Co. v. Croly, supra*, 983.

One part of instruction No. 13, objected to, told the jury that, if it found for the plaintiff "then the measure of his damages would be * * * the reasonable

2. value of the services of said child from the time of her injury until she will become of the age of twenty-one years, less the reasonable cost of her support and maintenance, until she arrives at said age", the aggregate not to exceed the amount named in the complaint. This instruction treats appellee's damages as being the same as though

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his child had been killed, or totally and permanently disabled. *Pennsylvania Co. v. Lilly* (1881), 73 Ind. 252, 254; *City of Elwood v. Addison* (1901), 26 Ind. App. 28, 35, 59 N. E. 47; *Southern Ind. R. Co. v. Moore* (1904), 34 Ind. App. 154, 157, 72 N. E. 479. The instruction should have limited appellee's recovery in the respect indicated, therein to the value of any services which the evidence showed that appellee *had lost and would probably lose* during the minority of such child as a result of such injury or any diminution of the value of such services, which the evidence showed had resulted and would probably result from such injury during said period. *Holcomb v. Norman* (1911), 47 Ind. App. 87, 91 N. E. 626; *Citizens St. R. Co. v. Twiname* (1890), 121 Ind. 375, 378, 23 N. E. 159, 7 L. R. A. 352. The instruction is open to criticism in another respect, but, inasmuch as it was clearly erroneous and necessarily harmful to appellant in that it directed, or at least, permitted, a larger recovery than the law authorized, its other infirmity need not be discussed.

On account of the error in giving such instruction the judgment below is reversed with instructions to the court to grant a new trial and for such other proceedings as may be consistent with this opinion.

NOTE.—Reported in 104 N. E. 328. As to railroad company's duty to person trespassing on track, see 30 Am. St. 53. As to the applicability of the doctrine of last clear chance where danger was not actually discovered, see 55 L. R. A. 418; 36 L. R. A. (N. S.) 957. As to whether wantonness or wilfulness, precluding defense of contributory negligence may be predicated on the omission of a duty before the discovery of a person in a position of peril on a railroad or street railway track, see 21 L. R. A. (N. S.) 427. On the right of an infant to recover damages for loss of services or diminished earning capacity, during minority, from personal injuries, see 6 L. R. A. (N. S.) 552. See, also, under (1) 36 Cyc. 1648; (2) 29 Cyc. 1651, 1652.

EULER v. EULER, ADMINISTRATOR.

[No. 8,047. Filed October 10, 1913. Rehearing denied February 25, 1914.]

1. **PLEADING.—Theory.—Sufficiency.**—A pleading should proceed on a certain and definite theory, and its sufficiency should be judged and determined on that theory. p. 553.
2. **APPEAL.—Review.—Sufficiency of Pleadings.**—On appeal the sufficiency of a pleading will be determined with reference to its theory as adopted in the trial court. p. 553.
3. **GUARDIAN AND WARD.—Accounting and Settlement.—Opening and Vacating.—Statutes.**—By virtue of §3074 Burns 1908, §2527 R. S. 1881, providing that the bond given by any guardian may be put in suit by any person entitled to the estate, "and such suit shall be governed by the law regulating suits on the bonds of executors and administrators", an action to set aside a guardian's final settlement may be maintained under §2925 Burns 1908, §2403 R. S. 1881, providing for setting aside and vacating the final settlement of decedents' estates, although not expressly authorized by the latter section. p. 554.
4. **EXECUTORS AND ADMINISTRATORS.—Actions.—Complaint.—Demurrer.**—A demurrer for want of facts addressed to the complaint of an administrator raises the question of whether it states a cause of action in his favor in the capacity in which he sues. p. 555.
5. **GUARDIAN AND WARD.—Opening and Vacating Settlements.—Complaint.—Persons Entitled to Maintain Action.**—While the language of §2925 Burns 1908, §2403 R. S. 1881, under which an action to open and set aside the final settlement of a guardian may be maintained, discloses a legislative intent to limit its application to such persons only as are adversely affected by the mistake, fraud or other illegality which entered into the settlement, where the property sought to be recovered is personal property of a deceased ward, the action should be prosecuted by the administrator of his estate, since by operation of law such property goes to the administrator; hence the complaint in such an action by an administrator was not insufficient, although it disclosed an interest in the heirs of the deceased ward which seemingly brought them within the spirit of the statute as being the proper parties to maintain the action. p. 555.
6. **GUARDIAN AND WARD.—Opening and Vacating Settlements.—Statutory Provisions.**—Although §2925 Burns 1908, §2403 R. S. 1881, providing for opening and setting aside settlements of decedents' estates, and under which an action may be maintained to open and set aside the settlement of a guardian, expressly re-

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stricts the right of action to any person interested who was neither present at the final settlement nor personally summoned to attend the same, such restriction does not apply where the action is to set aside the settlement of a guardian, for the reason that no notice of final settlement of a guardianship is required except where made under §3070 Burns 1908, §2523 R. S. 1881, providing for settlement of estates of deceased wards in certain cases without administration. p. 556.

7. **GUARDIAN AND WARD.—Action to Open and Vacate Settlement.—Complaint.—Harmless Error.**—Although a complaint, under §2925 Burns 1908, §2403 R. S. 1881, to set aside the final settlement of a guardian should aver that plaintiff was neither personally present at the settlement, nor summoned to appear, the error in overruling the demurrer to the complaint in such an action brought by the administrator of a deceased ward, for failure to contain such averment, was harmless, where plaintiff was permitted to prove that he had not qualified at the time of the settlement and could not have been present as such administrator. p. 557.
8. **APPEAL.—Review.—Objections to Evidence.**—A general objection to the admission of evidence, without the statement of any reason, is not available on appeal. p. 557.
9. **GUARDIAN AND WARD.—Action to Open and Vacate Settlement.—Complaint.—Sufficiency.**—A complaint by the administrator of the estate of a deceased ward against the guardian to set aside the latter's final settlement, alleging facts showing that none of the charges made by such guardian were legal or proper, and that his report showed an appropriation of all the funds and an indebtedness due him from his ward, was not open to the objection that it failed to show an injury to plaintiff from the mistake or fraud complained of. p. 558.
10. **GUARDIAN AND WARD.—Protection of Ward's Interests.**—The law jealously guards the interests of those whose estates are in the care and keeping of the courts. p. 558.
11. **GUARDIAN AND WARD.—Opening and Vacating Settlements.—Concealment or Misrepresentation by Guardian.**—A guardian, being an officer of the court, is under obligation to make full and true disclosures in his reports of all matters materially affecting his trust of which he has knowledge, so that any misrepresentation or concealment, whereby an approval of a settlement giving him an unfair advantage is procured, will vitiate such settlement and remove the foundation upon which the approval and order of the court rests. p. 558.
12. **GUARDIAN AND WARD.—Opening and Vacating Settlements.—Complaint.—Inferences from Facts Averred.**—A complaint to set aside a settlement made by a guardian, though merely mentioning the guardian's reports by way of reference, explanation or re-

cital, is not insufficient as failing to allege that any current report or final settlement was made, where the facts alleged justify the inference that such reports and final settlement were made and filed. p. 559.

13. **PLEADING.—Complaint.—Omissions.—Cure by Answer.**—The omission, in a complaint to set aside the settlement of a guardian, to allege that his reports and final settlement had been approved, was cured by defendant's answer alleging such filing and approval. p. 559.

14. **GUARDIAN AND WARD.—Accounting and Settlement.—Opening and Vacating.—Limitation of Actions.**—While an ordinary action by the administrator of a deceased ward against the guardian for money had and received would be controlled by the six years' statute of limitations, an action under §2925 Burns 1908, §2403 R. S. 1881, to set aside the final settlement of such guardian, must be brought within three years from the date of the settlement sought to be set aside. p. 560.

15. **APPEAL.—Review.—Harmless Error.—Ruling on Demurrer to Answer.**—Overruling the demurrer to an answer, in an action under §2925 Burns 1908, §2403 R. S. 1881, to set aside the settlement of a guardian, averring that the cause of action did not accrue within either the five or six year period of limitation, was harmless, where the undisputed evidence, admitted without objection, shows that the settlement was made less than three years before the bringing of the suit. p. 561.

16. **GUARDIAN AND WARD.—Action to Open and Vacate Settlement.—Admission of Evidence.**—In an action to set aside the final settlement of a guardian, the admission of the testimony of the probate commissioner as to certain proceedings and statements made by the guardian when his reports were filed and acted upon, was proper. p. 561.

17. **GUARDIAN AND WARD.—Action to Open and Vacate Settlement.—Exclusion of Evidence.**—A contract by those who expected to inherit the real estate of an insane ward, made with reference to such real estate, and under which the guardian was to care for said ward, while made for the ward's benefit, affected their interests alone in his real estate, so that, in an action after the ward's death by the administrator of his estate against the guardian to open and vacate the final settlement, evidence on behalf of the guardian showing a demand that the heirs comply with their agreement, and their refusal, was properly excluded. p. 562.

18. **APPEAL.—Review.—Evidence.—Sufficiency.**—Where each material averment of the complaint has some evidence for its support, a judgment for plaintiff will not be reversed on the ground of insufficient evidence. p. 562.

From Vanderburgh Circuit Court; C. A. DeBruler, Judge.

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Action by Charles Euler, administrator of the estate of Frederick Euler, deceased, against Jacob Euler. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Louis E. Kunkel and Robinson & Stilwell, for appellant.
Louis O. Rasch and Samuel E. Crumbaker, for appellee.

HOTTEL, P. J.—This is an action brought by appellee as administrator of the estate of Frederick Euler, deceased, to revoke and set aside the final settlement and current reports of appellant as guardian of said decedent, and to recover judgment against such guardian for the funds received by him. The complaint was in two paragraphs. The first paragraph was dismissed, and hence it and the pleadings addressed thereto need not be considered. A demurrer to the second paragraph for want of facts was overruled, and appellant filed an answer in three paragraphs, the second and third of which plead the six and five years' statutes of limitations respectively, and were each held insufficient against a demurrer. A trial by the court resulted in a finding for appellee that the proceedings of appellant during his trust as guardian were "grounded in fraud and mistake of facts and ought to be set aside and held for naught" and that appellee recover of appellant \$5,276.67. A motion for new trial and a motion in arrest of judgment were overruled and exceptions saved to each ruling. The errors relied on for reversal, and argued by appellant in his brief, present each of the above indicated rulings on the said several demurrers to the pleadings, and the respective rulings on the motion for new trial and the motion in arrest of judgment.

The facts about which there seems to be no dispute, are, in substance, as follows: On March 10, 1876, Frederick Euler, then in life, was adjudged a person of unsound mind, and appellant, Jacob Euler, a brother, was appointed his guardian, and as such qualified and entered upon the performance of the duties of such trust. At that time Frederick's estate consisted of a fraction over thirty-four acres

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of real estate of the probable value of \$3,000 and a yearly rental value of \$100. Frederick Euler then had a living sister, Elizabeth Crass, and three brothers, viz., Charles Euler, George Euler and said Jacob Euler. The sister and brothers constituted the sole and only persons who, at that time, would become the heirs of Frederick in case of his death, and they, on March 14, following, entered into an agreement for his care and maintenance, which agreement was reduced to writing and signed by all of them except Jacob, and also signed by the husband of Mrs. Crass. The agreement follows:

“Know all men by these presents that Charles Euler, George Euler, Elizabeth Crass and Andrew Crass, her husband, all of the county of Vanderburgh, and the State of Indiana, parties of the first part, and Jacob Euler, of said county and State, party of the second part, have this day entered into the following contract and agreement, to wit: Whereas one Frederick Euler, the brother of all the parties hereto has been adjudged as a person of unsound mind and incapable of managing his estate, and it being necessary for some one to take care of said Frederick Euler, now, therefore, it is agreed by the parties hereto that said Jacob Euler shall take care of said Frederick Euler, keep him at his house and support him and take care of him during his natural life, furnishing him all necessary comforts and generally providing for him as a member of his own family, in consideration whereof the said parties of the first part, covenant and agree for themselves, their executors, heirs and administrators to convey, surrender, release, waive and quitclaim unto said Jacob Euler all right, title and interest which they may now have or may at any future time acquire or inherit as heirs of said Frederick Euler in and to the following described real estate, in the County of Vanderburgh, State of Indiana, to wit: (Here follows description.) In witness whereof the said parties of the first part have hereunto subscribed their names and set their seals this 14th day of March, 1876. Charles Euler, L. S. George Euler, L. S.

Her
Elizabeth (X) Crass, L. S. Andrew Crass, L. S.”
Mark.

This agreement was acknowledged by all the parties who signed it and was recorded March 14, 1876. At this time Frederick was living with his brother, Jacob, and thereafter, until his death, remained in the home of Jacob and was there maintained and supported as provided in such agreement. Appellant failed to file any current report as guardian, prior to March 10, 1886, at which time the court, on account of such failure, entered an order revoking his appointment. Later said ward was allowed a pension by the United States Government and on May 14, 1894, the appellant filed in the court of his former appointment a petition wherein he represented that Frederick Euler had been allowed a pension and prayed that letters of guardianship be again issued to him. The prayer of this petition was granted and letters of guardianship were again issued to appellant and he thereupon qualified and entered upon the duties of his said trust, and from time to time filed current reports until the death of his ward, which occurred March 16, 1910. On June 15, 1910, the appellant filed his final settlement as guardian, in which he showed a balance due him of \$1,400.50 in excess of all sums received by him.

The complaint in addition to setting out the above facts, avers in substance, that the guardian, after his second appointment, received pension money aggregating \$2,894 and rents and profits from the real estate amounting to \$809; that none of this was loaned by the guardian; that all of it could have been loaned at the rate of eight per cent per annum; that the agreement above set out, which is filed as an exhibit with the complaint and made a part thereof, was made by said heirs for the benefit of said ward, and that appellant acted thereunder and complied with the terms thereof until May 14, 1894, when he filed his petition to be reappointed guardian; that up to this time, appellant made no charge nor claim for clothing, shoes, tobacco, board, washing, etc., furnished said ward; that by reason of said agreement, the charges afterwards made therefor by appel-

lant were unjust and illegal; that said ward during all of said time was physically able to earn money and that appellant kept him employed and his services to said guardian were of the value of \$10 per month; that in his reports as guardian, appellant concealed said facts from the court; that the representations made by the guardian in his current reports and in his final report were false and untrue in law and in fact, and that he was at no time entitled to charge, collect and appropriate the ward's money for the purposes therein stated; that appellant mingled said ward's money with his own money and wrongfully and without right appropriated and converted to his own use all of the property of said ward and refused to pay the same. Appellant then asks "that all and singular reports made by said guardian * * * and the orders of the court, made and entered therein and thereon be set aside and held for naught, that the report in final settlement and the pretended final settlement of said guardian and the order of court confirming the same and granting a discharge to said guardian be set aside and held for naught, and that plaintiff be awarded judgment of and from the defendant in the aggregated amount of money received by him as guardian as aforesaid together with interest thereon in the sum of Six Thousand Dollars (\$6,000.00.)"

A pleading should proceed on a certain and definite theory and its sufficiency should be judged and determined on that theory. *Mescall v. Tully* (1883), 91 Ind.

1. 96, 99; *Terre Haute, etc., R. Co. v. McCorkle* (1895), 140 Ind. 613, 622, 40 N. E. 62; *Platter v. City of Seymour* (1882), 86 Ind. 323, 326; *Smith v. Rosebloom* (1894), 10 Ind. App. 126, 128, 37 N. E. 559; *Chicago, etc., R. Co. v. Bills* (1885), 104 Ind. 13, 16, 3 N. E. 611. The theory of a pleading adopted by the parties and the
2. trial court will be adopted by this court on appeal, and on such theory the sufficiency of the pleading will be determined. *Brink v. Reid* (1890), 122 Ind. 257,

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258, 259, 23 N. E. 770; *Feder v. Field* (1889), 117 Ind. 386, 391, 20 N. E. 129; *Lewis v. Stanley* (1897), 148 Ind. 351, 357, 45 N. E. 693, 47 N. E. 677; *Flint & Walling Mfg. Co. v. Beckett* (1906), 167 Ind. 491, 504, 79 N. E. 503, 12 L. R. A. (N. S.) 924; *Oölitic Stone Co. v. Ridge* (1908), 169 Ind. 639, 644, 83 N. E. 246; *Southern R. Co. v. Crone* (1912), 51 Ind. App. 330, 99 N. E. 762.

It is evident from the judgment and other proceedings of the trial court hereinafter disclosed that such court held the complaint sufficient as stating a cause of action

3. under §2925 Burns 1908, §2403 R. S. 1881, which provides as follows: “When final settlement of an estate shall have been made, and the executor or administrator discharged, any person interested in the estate, not appearing at the final settlement, nor personally summoned to attend the same, may have such settlement, or so much thereof as affects him adversely, set aside, and the estate re-opened, by filing in the court in which the settlement was made, within three years from the date of such settlement, his petition, particularly setting forth the illegality, fraud or mistake in such settlement or in the prior proceedings in the administration of the estate, affecting him adversely. The executor or administrator of the estate, and any of the creditors, heirs, devisees, or legatees of the decedent adversely interested in the matters alleged in such petition, shall be made defendants thereto, and shall be entitled to such notice of the pendency thereof as is required to be given, under the code of civil procedure, to defendants in ordinary actions. If any person interested in an estate shall, at the time of the final settlement thereof, be under legal disabilities, he may file such petition within three years from the time of the removal or cessation of such disability.” This section does not expressly provide for setting aside a final settlement of an estate by a guardian, but §3074 Burns 1908, §2527 R. S. 1881, provides that “Any bond given by any guardian may be put in suit

by any person entitled to the estate, and such suit shall be governed by the law regulating suits on the bonds of executors and administrators.” It has been expressly held that by virtue of the latter section, the former applies to guardianships. *State, ex rel. v. Parsons* (1900), 155 Ind. 67, 69, 57 N. E. 711, and authorities there cited; *Briscoe v. Johnson* (1881), 73 Ind. 573, 576; *Horton v. Hastings* (1891), 128 Ind. 103, 104, 27 N. E. 338; *State, ex rel. v. Parsons* (1897), 147 Ind. 579, 47 N. E. 17, 62 Am. St. 430.

Appellant does not dispute the application of §2925, 4. *supra*, to settlements made by guardians, but insists that appellee in his complaint fails to bring himself within the terms of such section. It is insisted that, under the averments of this complaint, the action is not properly brought by the administrator, and that no cause of action is stated in him. Inasmuch as this question is tendered by the demurrer for want of facts (*Martin v. Caldwell* [1911], 49 Ind. App. 1, 96 N. E. 660, 661; *Coddington v. Canaday* [1901], 157 Ind. 243, 252, 253, 61 N. E. 567; and *Toner v. Wagner* [1902], 158 Ind. 447, 449, 63 N. E. 859), it will be first considered.

This complaint does not show that the guardian left unpaid any debts against the estate of his ward, but on the contrary, the reasonable, if not the necessary, infer-

5. ence to be drawn from all the facts averred is that the guardian had himself paid all the debts against the estate of his ward and that the heirs of the ward are the only persons adversely affected by the fraud which is alleged to have vitiated the final settlement sought to be set aside by the appellant. The language used in §2925, *supra*, makes clear the intent of the legislature to limit its application and benefits to such persons only as are adversely affected by the mistake, fraud or illegality which entered into the final settlement of the administrator or executor sought to be set aside. See, also, *Smith v. Miller* (1898), 21 Ind. App. 82, 84, 51 N. E. 508; *Spicer v. Hockman*

(1880), 72 Ind. 120, 123, 124. Under the facts alleged in this complaint and the agreement above set out, the heirs of the deceased ward seem to fall more clearly within the spirit of the statute than does the administrator who brings the action. However, the property sought to be recovered herein was the personal estate of the deceased ward and by operation of law such estate went to the administrator of his estate. Furthermore, the Supreme Court has expressly held that actions of this character accrue to the administrator of the estate of the deceased ward, and should be prosecuted by him. *Horton v. Hastings, supra*; *Peterson v. Irwin* (1902), 28 Ind. App. 330, 333, 62 N. E. 719.

It is also insisted by appellant that the complaint in this case is fatally defective because it fails to aver that the appellee was not personally present at the final set-

6. tlement made by the guardian and was not personally summoned to attend the same. The statute in question, by its express terms, limits its benefits to such persons, and in cases involving a final settlement made by an executor or administrator, the Supreme Court and this court have indicated that such absent averments or their equivalent are important and necessary. *Crum v. Weeks* (1891), 128 Ind. 360, 362, 363, 27 N. E. 722; *Dilman v. Barber* (1888), 114 Ind. 403, 404, 406, 16 N. E. 825. In this connection, however, it must be remembered, as before indicated, that the section of statute in question is limited in its application to estates of administrators and executors, and that it is by reason of other sections of the statute that the courts have extended such application to estates settled by guardians. The courts must be presumed to have intended such extension in so far only as the provisions of such section could be consistently applied to estates of guardians, having regard for the general provisions of the law regulating the settlement of such estates. The law regulating the settlement of estates by an administrator or executor expressly provides for the notice of such settlement. §2912 Burns

1908, Acts 1883 p. 160. Hence the importance and reason for the limitation of the benefits of §2925, *supra*. No such provision for notice of a settlement by a guardian exists, except that he settle under §3070 Burns 1908, §2523 R. S. 1881. *Castetter v. State, ex rel.* (1887), 112 Ind. 445, 14 N. E. 388; *Doan v. Dow* (1893), 8 Ind. App. 324, 35 N. E. 709. It follows that there is no reason to apply to such settlements, that part of §2925, *supra*, which limits the benefits thereof to those only who were not personally summoned to attend such settlement, and where the reason for a rule ceases, it is fundamental that the rule itself ceases. How-

ever, the absence of a statute requiring notice of final

7. settlement by guardians furnishes no reason for omitting from the complaint the averment that the plaintiff was not present at such settlement, but in this case the appellee was permitted to prove without objection that the final settlement of the guardian was filed June 6, 1910, and that the judgment approving such report and discharging the guardian was rendered on that day. Appellee was also permitted to introduce in evidence his letters of administration which show that they were not issued until November 26, 1910, some five months after the filing and approval of the guardian's final settlement. This undisputed evidence shows that the administrator who brings the action was not appointed until more than five months after the guardian's final settlement and discharge, and hence, in his capacity as administrator, could not have been present at or summoned to appear at such final settlement. This proof

was made without any objection by appellant except

8. a general objection to the admission of the letters accompanied by no reason and therefore was not available. Hence it appears, that the absent averments of the complaint were supplied by the proof without objection and under the recent holdings of the Supreme Court and this court, the error in overruling the demurrer on account of such absent averments was thereby cured and

his ward will vitiate such settlement and remove the foundation upon which such approval and order of the court rests. *State, ex rel. v. Petersen* (1905), 36 Ind. App. 269, 274, 276, 75 N. E. 602; *Slaughter v. Favorite* (1886), 107 Ind. 291, 298, 299, 4 N. E. 880, 57 Am. Rep. 106; *Favorite v. Slaughter* (1881), 79 Ind. 562, 563, 564; *Asher v. State, ex rel.* (1882), 88 Ind. 215; *Doan v. Dow, supra*, 326; *State v. Parsons, ex rel., supra*, 69. We have indicated before, enough of the averments of the complaint to show that, under these authorities, it is not open to the objection last indicated.

Finally it is contended that the complaint nowhere alleges that any current report or final settlement was filed or made, or that there was any order or judgment of court ap-

12. proving such final settlement. While all mention made in the complaint of the reports filed by the guardian seems to be by way of reference, explana-

13. tion or recital, yet we think that, under the more recent decisions of the Supreme Court, they are such as would justify the inference that such reports and final settlements were made and filed, but there is no averment anywhere in the complaint that any report of the guardian either current or final was ever approved or in any way acted upon or disposed of by the court in which the same was filed, or that appellant was ever discharged, or that any order or judgment of court was made in connection with any of such reports, nor are there any facts pleaded that would warrant any such inference. So far as appears from this complaint, the entire proceedings of the guardian, including his report of final settlement, may be pending for the action and approval of the court in which they were filed, except we may indulge the inference that such reports were approved because in his prayer appellant seeks to have them set aside. The purpose of the statute on which this action was based being to provide a means of setting aside a settlement, an action based thereon should certainly aver facts

showing that such a settlement had been made and that there had been an order and judgment of the court approving it. The appellant filed a first paragraph of answer addressed to this paragraph of complaint, in which he averred in substance that such guardian filed current reports and a final report; that each of such reports was approved by the court; that the court rendered a final judgment approving such final report of the guardian and discharging him from all further liability thereunder; that all of the business of the guardianship was closed and finally settled by order of court. The admissions in this answer supplied and rendered harmless the omission of said averments in the complaint to which such answer was addressed. *Lux, etc., Stone Co. v. Donaldson* (1904), 162 Ind. 481, 491, 494, 68 N. E. 1014; *Boots v. Canine* (1884), 94 Ind. 408, and authorities there cited.

It is next urged that the trial court erred in sustaining the demurrers to the paragraph of answer, setting up the five and six years' statutes of limitations respectively.

14. If this were an ordinary action by the administrator of the deceased ward against the guardian for money had and received by him, appellant would be correct in his contention that the six years' statute of limitations should apply, (See, *Roberts v. Smith* [1905], 165 Ind. 414, 419, 75 N. E. 894; and *State, ex rel. v. Parsons* [1897,] 147 Ind. 579, 583, 47 N. E. 17, 62 Am. St. 430), but as before indicated, it is evident that the parties and the trial court treated the complaint as being based on §2925 Burns, *supra*. This statute furnishes its own limitation and provides that the action can be brought within three years from the date of the settlement sought to be set aside. *Spicer v. Hockman, supra*; *Glessner v. Clark* (1895), 140 Ind. 427, 431, 39 N. E. 544; *State, ex rel. v. Parsons* (1897), 147 Ind. 579, 582, 47 N. E. 17.

The answers here pleaded included the period fixed by the statute as the time in which the action should be brought,

but neither of such answers averred that the settlement sought to be set aside was made within the five or 15. six years respectively pleaded in such answers. They respectively averred that the appellee's cause of action did not accrue within the five and within the six year period respectively pleaded before the filing of appellee's suit. The trial court possibly took the view that the appellee's cause of action to recover the money appropriated by the guardian, might have accrued more than five or six years before the filing of the suit, and yet that the settlement sought to be set aside might have been filed less than three years before such suit, but whatever may have been the theory upon which the trial court sustained the demurrers to the answers, and whether right or wrong the ruling was harmless, because the undisputed evidence, admitted without objection, shows that the final settlement was not made until June 6, 1910, and less than three years before the bringing of this suit. Under the authorities before cited herein, no harm could have resulted to appellant by the ruling on the demurrer to said answers, and hence, such rulings, if erroneous, furnish no grounds for reversal.

The trial court called as a witness A. C. Hawkins, the probate commissioner, who had passed upon some of appellant's reports as guardian. This witness, over appel- 16. lant's objections, was permitted to testify in relation to certain proceedings and statements made by the guardian when his reports were filed and acted upon. Error in admitting this evidence, constitutes one of the grounds of the motion for new trial and is urged as cause for reversal. This court has passed upon this question and settled it against the contention of appellant. *Doan v. Dow, supra.*

Appellant offered to prove by his attorney that a demand was made on the heirs of Frederick Euler, deceased, for a conveyance of the real estate described in the contract before

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set out in this opinion, which demand was refused
17. by each of said heirs. This evidence was excluded
and it also furnishes one of the grounds of the
motion for new trial which is urged as cause for reversal.
The deceased ward was not a party to said contract. True,
it was made for his benefit, but it was made by his heirs
and affected their interest alone in his real estate. The heirs
are not parties to this suit, and their refusal to carry out
such contract could not operate to defeat or affect appellee's
right to recover in this action. Under the issues, as here
formed, we think the evidence was properly excluded. Ap-
pellant has his remedy for the enforcement of his contract
if the heirs persist in their refusal to comply with its terms.

It is urged that the court erred in overruling appellant's
motion in arrest of judgment, but the questions presented in
the discussion of this motion are practically the same as
those discussed and determined in our discussion of the
objections to the complaint, and hence need not be further

considered. Finally it is insisted that the decision
18. of the trial court is not sustained by sufficient evi-
dence. Our examination of the evidence convinces us
that each of the material averments of the complaint had,
at least some evidence for its support, which is enough to
prevent a reversal on said ground.

We find no reversible error in the record and the judg-
ment is therefore affirmed.

NOTE.—Reported in 102 N. E. 856. As to the fiduciary character
of a guardian, see 89 Am. St. 302. See, also, under (1) 31 Cyc. 84;
(2) 2 Cyc. 672; (3) 21 Cyc. 181; (4) 31 Cyc. 321; (5) 21 Cyc. 183,
184; (7) 31 Cyc. 358; (8) 38 Cyc. 1378; (9) 21 Cyc. 184; (10) 21
Cyc. 78; (11) 21 Cyc. 182; (12) 31 Cyc. 48; (13) 31 Cyc. 714; (14)
21 Cyc. 183; (15) 31 Cyc. 358; (16) 21 Cyc. 185; (18) 3 Cyc. 360.

HOUSER ET AL. v. LAUGHLIN ET AL.

[No. 8,211. Filed February 26, 1914.]

1. **APPEAL.—*New Trial.—Motion.—Necessity.***—Although as a general rule error based on the ruling on a motion for a change of venue must be assigned in the motion for a new trial in order to be presented on appeal, it may be presented as an independent assignment of error where the judgment appealed from is entered by default, since in such case there is no trial in the sense of a trial that requires the instrumentality of a motion for new trial to obtain relief from the judgment. p. 568.
2. **VENUE.—*Motion for Change.—Denial.***—While as a general rule, in a civil action, a motion for a change of venue, seasonably made, should be granted, where the filing of such a motion is admitted to be for the purpose of obtaining a continuance, the court is justified in overruling such motion or in striking it from the files. pp. 569, 571.
3. **APPEAL.—*Questions Reviewable.—Application for Continuance.***—One entitled to a continuance should apply to the court regularly to that end, and while the granting of such application may be in the discretionary power of the court, an abuse of such discretion is reviewable on appeal. p. 570.
4. **VENUE.—*Motion for Change.—Action on Motion.***—A court may properly suspend action on a motion for a change of venue from the county until the issues are made, hence requiring defendant to answer interrogatories pending the disposition of his motion for a change of venue was not error. p. 571.
5. **JUDGMENT.—*Default.—Pending Motion for Change of Venue.***—Where judgment was taken against defendant by default pending a ruling on his motion for a change of venue from the county, a ruling on such motion is unnecessary. p. 571.
6. **APPEAL.—*New Trial.—Necessity for Motion.***—Where defendant, against whom judgment has been rendered by default, does not contest the amount of the damages, but merely moves for relief from the judgment, it is sufficient to present the matter on appeal by assigning error in the ruling on such motion; a motion for a new trial being in such case not only unnecessary, but inappropriate. p. 572.
7. **JUDGMENT.—*Default.—Grounds.—Failure to Answer Interrogatories.***—Under §410 Burns 1908, §401 R. S. 1881, providing for judgment by default against a party failing to plead or make up issues within the time prescribed; §365 Burns 1908, §359 R. S. 1881, providing that interrogatories must be answered within the time limited; and §409 Burns 1908, §400 R. S. 1881, providing

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that the court "shall compel the parties to file their respective pleadings and answers to interrogatories at such time as the court shall deem just, in no case allowing unreasonable delay", where a party fails to discharge a rule to file answers to interrogatories, the court may strike out his pleadings and enter judgment against him as by default. p. 573.

8. **JUDGMENT.—Default.—Vacating.**—Not only do the courts possess power, independent of statute, to exercise a very large discretion in vacating judgments entered by default, but discretion is vested in them to grant such relief by virtue of §405 Burns 1908, §396 R. S. 1881, providing that the court may relieve any party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. p. 573.
9. **Judgment.—Default.—Vacating.**—To entitle a party to relief under §405 Burns 1908, §396 R. S. 1881, from a judgment taken by default, he must show that he exercised reasonable diligence to prevent the entering of the judgment; so that where it appears that defendant was ruled to file answers to interrogatories and a default was taken on his failure to do so, a showing in an application for relief, that the failure to comply with the rule was due to alleged insufficiency of the time given, while appropriate as cause for an extension of the time, was insufficient to entitle him to the relief sought, in the absence of facts showing either mistake, inadvertence, surprise, or excusable neglect, within the meaning of the statute. pp. 574, 575.
10. **DISCOVERY.—Rule to Answer Interrogatories.—Insufficiency of Time.—Relief.**—Under §§405, 410 Burns 1908, §§396, 401 R. S. 1881, authority is expressly conferred on the courts to grant extensions of time in such matters as the discharge of a rule against a party to file answers to interrogatories. p. 574.
11. **ATTORNEY AND CLIENT.—Negligence.**—The negligence of an attorney in failing to take proper steps to discharge a rule against his client to answer interrogatories is the negligence of the client. p. 575.
12. **APPEAL.—Appeal Bond.—Failure to Fix Terms.**—Appellant cannot urge as error the trial court's failure to fix the amount of the appeal bond, or the time in which to file it, where he made no attempt to perfect a term time appeal and chose to perfect it as a vacation appeal. p. 576.

From Superior Court of Marion County (81,889); *Joseph Collier*, Judge.

Action by George W. Laughlin and another, as partners, against Virgil E. Houser and others. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

Newton J. McGuire, for appellants.

Thomas D. McGee, Edward D. Reardon and James H. Drew, for appellees.

CALDWELL, J.—Appellees, as partners, brought this action in the Marion Superior Court of Marion County, Indiana, against appellant, Virgil E. Houser, to recover a balance alleged to be due on a building contract, and to enforce a mechanic's lien. Amanda Houser and the State Life Insurance Company, named as appellants, were made defendants, it being alleged that they claim some interest in the real estate against which it is sought to enforce said lien.

From the transcript, including a certain counter-affidavit hereinafter referred to, the following facts appear: The action was commenced October 10, 1910. There was some delay in making issues, for which delay appellant, Virgil E. Houser, was in part, at least, responsible. On March 14, 1911, the cause was assigned to be tried in May. Appellant Virgil E. Houser procured a postponement by representing to the court that the cause was triable by a jury and by demanding a jury. The court being informed of the nature of said action and that it was not triable by a jury, reassigned it for May 17, prior to which time appellant Virgil E. Houser's attorney asked a postponement as a personal favor, and agreed to be ready for trial at any time after May 17. Said cause was thereupon postponed, and reassigned for Monday, June 26, at 9:00 a. m. On Saturday, June 24, appellant Virgil E. Houser filed an affidavit and motion for a change of venue from the judge presiding in Room 1 of said court, being the room in which the cause was pending, which motion was sustained, and the cause regularly transferred to Room 2 for trial, and on said day reassigned to be tried June 26, as aforesaid, and the parties notified. At said time and place appellees appeared with their attorneys and witnesses ready for trial, but neither appellant Virgil E. Houser nor his attorney appeared. In obedience to a call, the latter came into court and announced

that his client was not ready for trial, and verbally asked a continuance, which being refused, said attorney stated that "since a continuance would not be granted him, he would file an affidavit for a change of venue from the county", and he thereupon took from his pocket an affidavit and motion for a change of venue from the county, theretofore signed and sworn to, and thereupon caused the same to be filed.

On June 27, appellees' attorney, by order of court, filed an information against said appellant Virgil E. Houser, charging him with contempt of court, by reason of his filing said affidavit and motion for a change of venue, under the attending circumstances. No ruling was made on said affidavit and motion for a change of venue from the county, and no further steps seem to have been taken in said contempt proceeding. On June 27, appellees filed interrogatories, twenty in number, to said appellant Virgil E. Houser, which he was ruled to answer by June 29 at 9:00 a. m. Said appellant Virgil E. Houser, having failed to answer the interrogatories within the time fixed, the court, on June 29, struck out his pleadings, had him called and defaulted, and also defaulted Amanda Houser, who had filed no pleadings, and proceeded to hear and determine said cause on the complaint and the answer filed by the insurance company. Judgment was entered against appellant Virgil E. Houser in the sum of \$175.49, and foreclosing the lien against all the defendants. On June 30, appellant, Virgil E. Houser, filed a verified motion to vacate the judgment, and to set aside the default, which motion was supported also by an affidavit made by his attorney. A counter-affidavit, hereinbefore mentioned, was filed by appellees' attorney. The court overruled the motion, and appellant, Virgil E. Houser, reserved an exception. Said affidavit made and filed by appellant's attorney in support of said application to be relieved from default, recites in substance the following additional facts: That said attorney demanded a jury trial, because his client had requested him to procure such

trial, and that at the time, he did not have in mind that said cause was not triable by a jury; that said cause was continued the second time because appellant was sick and unable to attend court; that said attorney never agreed to try the cause at any particular time; that when the venue of the cause was changed from the judge on Saturday, June 24, affiant assumed that it would come up regularly for assignment in the next monthly calendar; that late on said Saturday afternoon, he was notified that said cause was assigned to be tried in Room 2 on Monday, June 26, at 9:00 a. m.; that affiant's client was out of the city on Sunday, and affiant did not get into communication with him until Monday morning at six o'clock; that it was impossible for affiant and his client to prepare for trial by 9:00 a. m.; that about 9:15 a. m. affiant went to said Room 2 in response to a call, and tried to convince the court that it was impossible for affiant and his client "to try this cause without some notice and time to get our witnesses in"; that affiant understood the court to direct the clerk to swear the witnesses, whereupon, he produced and filed the affidavit for a change of venue from the county, which affidavit had been prepared and sworn to earlier in the morning. The facts set out in said motion for relief will be considered in another connection.

No motion for a new trial was filed. Appellant, Virgil E. Houser, alone assigns error, consisting of thirteen specifications. The first five relate to the failure of the court to rule on and sustain said motion for a change of venue from the county, and to the court's permitting said subsequent steps to be taken in said action pending a disposal of said motion. Specifications six to ten, inclusive, assign that the court erred in not giving reasonable time to answer said interrogatories, and in striking out appellant Virgil E. Houser's pleadings, and entering judgment as by default, and not affording appellant an opportunity to be heard in said matters. Specifications 11 and 12 assign that the court

question under consideration. *Rooker v. Bruce* (1908), 171 Ind. 86, 88, 85 N. E. 351; *Goodrich v. Strangland* (1900), 155 Ind. 279, 58 N. E. 148; *Erwin School Tp. v. Tapp* (1890), 121 Ind. 463, 23 N. E. 505; *Corwin v. Thomas* (1882), 83 Ind. 110; *Reed v. Spayde* (1877), 56 Ind. 394; *Brenner v. Heiler* (1910), 46 Ind. App. 335, 338, 91 N. E. 744; *Debbs v. Dalton* (1893), 7 Ind. App. 84, 89, 34 N. E. 236.

The record discloses that the affidavit and motion for a change of venue from the county were sufficient in form and substance, and there is nothing to show that the

2. application was not seasonably made. Under such circumstances, it is the duty of the court, as a general rule, in a civil suit, to grant the change. *Louisville, etc., R. Co. v. Martin* (1897), 17 Ind. App. 79, 47 N. E. 394. However, as we have said, it is alleged in said counter-affidavit made and filed by the attorney for appellees, that appellant Virgil E. Houser's attorney, when unsuccessful in obtaining a continuance on verbal motion, made the statement that "since a continuance would not be granted him, he would file an affidavit for a change of venue from the county" and that he thereupon produced and filed said affidavit. This allegation is not in any manner controverted. In fact, appellant Virgil E. Houser, at least by strong implication, concedes that said application for a change of venue was made for the purpose of delaying the trial of the cause or preventing the trial thereof as assigned. Thus, in the affidavit made and filed by his attorney in support of the application to be relieved from the default, occurs this language: "Affiant immediately went over to Room 2, appeared before the court, and tried in every way possible to convince the court that it would be utterly impossible for affiant and his client to try this case without some notice and time to get our witnesses in. Affiant understood the court to say to the clerk to 'swear the witnesses', whereupon affiant produced an affidavit and motion for a change

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of venue from the county, which had been prepared that morning in his office", etc. In appellant's brief is found the following statement: "On June 26th, 1911, defendant, Virgil E. Houser, being called on to try the case, without a chance to prepare, or subpoena witnesses, he filed his motion and affidavit for a change of venue from the county." And again "we were called over to Room 2 of the Marion Superior Court to try the case immediately, no chance being given to subpoena witnesses or prepare for the case. Whereupon, appellant's attorney filed an affidavit for a change of venue from the county." It seems apparent that said quoted language properly interpreted, compels the conclusion that thereby appellant conceded in the court below and now concedes in this court that said application for a change of venue was made, not because the averments therein contained were true, or believed to be true, but in order that thereby appellant Virgil E. Houser might delay the trial of said cause. Not only does this seem manifest, but also appellant Virgil E. Houser seems to justify his course by appealing to the attending facts and circumstances. It is expressly held that where counsel in presenting a motion for a change of venue from the county, states in open court that the purpose of filing and presenting it is to procure time, the court is not only justified in overruling such motion, but also in striking it from the files. *Chisson v. Barbour* (1885), 100 Ind. 1. To the same effect are the following: *Davis v. Rivers* (1878), 49 Iowa 435; *Kilbourne v. Fairchild* (1834), 12 Wend. (N. Y.) *292; *Haywood v. Thayer* (1833), 10 Wend. (N. Y.) *571; *Smith v. Prior* (1833), 9 Wend. (N. Y.) *498; *Taylor v. Smith* (1890), 11 N. Y. Supp. 29; 40 Cyc. 125.

The foregoing decisions are supported by sound principles of public policy. If facts existed by virtue of which

appellant Virgil E. Houser was entitled to a contin-

3. uance, he should have applied to the court regularly to that end. Even though such application would

have constituted no more than an appeal to the discretionary power of the court, an abuse of such discretion is reviewable by this court. We do not hold that where an affidavit for a change of venue from the county is filed in a civil suit, the court has a right to prosecute an investigation respecting the truth of the matter therein contained, or to inquire into the motives that prompt the applicant. We do

2. hold, however, that where the party filing such an application, either in person or by attorney, admits in the trial court that it is filed for purposes of delay, the court is justified in ignoring it, striking it from the files, or overruling it, and where it is conceded in this court that such purposes prompted the filing of such an affidavit, the court's disposal of it in either of the methods mentioned will not be reviewed by this court. Even if the court's action respecting said motion for a change of venue is construed as a denial thereof, the court did not err under the special circumstances of this case. However, the court did

4. not overrule the motion. As far as the record discloses, no ruling was made respecting it. After the filing of said motion, the court permitted the interrog-

5. atories to be filed, and entered said order requiring them to be answered. These interrogatories were directed to questions of fact involved in the action. It is held that a court may properly suspend action on a motion for a change of venue from the county until the issues are made. Among the reasons are "that the parties might be apprised of the issues to be tried in the case, and not be compelled to act in the dark in preparing evidence for the trial, and thus, perhaps, burden themselves with unnecessary witnesses, to be taken to another county." *Matlock v. Fry* (1860), 15 Ind. 483. See, also, *Galey v. Mason* (1910), 174 Ind. 158, 91 N. E. 561, Ann. Cas. 1912 C 1290; *Risher v. Morgan* (1877), 56 Ind. 172; *Dawson v. Vaughan* (1873), 42 Ind. 395. It would seem that where, as here, the grounds assigned in such a motion are local prejudice,

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etc., not in any manner involving the judge, the reason back of such rule would extend it to a situation such as is presented here. Suspending action on the motion was not in fact overruling it, and appellant Virgil E. Houser's subsequent default rendered a ruling unnecessary. Cases cited by appellants to the effect that on the timely filing of an affidavit for a change of venue, proper in form and substance, it is the duty of the court to grant it without proceeding further with the case, involve motions for a change of venue from the judge rather than from the county. In any view of this case, the court committed no error in the matter of the application for a change of venue.

Assignments six to twelve inclusive, present in effect the question of whether the court erred in overruling appellant

Virgil E. Houser's motion for relief from said judg-

6. ment. Appellees contend that the correctness of the ruling cannot be challenged by independent assignment, but that such ruling should have been assigned in a motion for a new trial, and error predicated on the overruling of such motion. It is only in exceptional cases that a motion for a new trial is proper, where judgment is entered on default. If the defendant appears after default and exercises his right to contest the amount of damages, he may move for a new trial, presenting in his motion any question that arose in such contest affecting the assessment of damages. *Erwin School Tp. v. Tapp, supra; Briggs v. Snegham* (1873), 45 Ind. 14; 1 Works' Practice §458. But where, as here, a defendant does not appear after default and contest the amount of damages, as has been said, there is in fact no trial. In such a case, it is uniformly held that relief cannot be obtained by a motion for a new trial, as a new trial would scarcely be appropriate where there has in fact been no trial. In this case, appellant moved for relief from said default and judgment, and has assigned error on the overruling of such motion, and in so doing has followed the proper course. *Rooker v.*

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Bruce, supra; Corwin v. Thomas, supra; Reed v. Spayde, supra; Fiske v. Baker (1874), 47 Ind. 534, 538; *Erwin School Tp. v. Tapp, supra; Masten v. Indiana Car, etc., Co.* (1900), 25 Ind. App. 175, 57 N. E. 148.

We proceeded to consider said assignments. It is provided by statute that "If, from any cause, either party shall fail to plead or make up issues within the time pre-

7. scribed, the court shall forthwith enter judgment as upon default, unless, for good cause shown, further time be given for pleading." §410 Burns 1908, §401 R. S. 1881. The statute providing for the propounding of interrogatories to parties, contains the following provision: "All interrogatories must be answered within the time limited, positively and without evasion, and the court may enforce the answer by attachment or otherwise." §365 Burns 1908, §359 R. S. 1881. The statute on the subject of the time and order of settling issues, contains a provision that the court "shall compel the parties to file their respective pleadings and answers to interrogatories at such time as the court shall deem just, in no case allowing unreasonable delay." §409 Burns 1908, §400 R. S. 1881. Under said statutes, where the party fails to comply with the court's order directing him to file answers to interrogatories, the court has authority to strike out his pleadings, and enter judgment against him as by default. *Fitch v. Citizens Nat. Bank* (1884), 97 Ind. 211; *Reed v. Spayde, supra; Norris v. Dodge's Admr.* (1864), 23 Ind. 190; 1 Works' Practice §§451, 448; Elliott, App. Proc. §335.

Independent of statute, courts possess power to exercise a very large discretion in vacating judgments entered by default. *Milbourn v. Baugher* (1909), 43 Ind. App. 35,

86 N. E. 874; *Hoag v. Old Peoples, etc., Society*

8. (1891), 1 Ind. App. 28, 27 N. E. 438. In this State,

however, there is a special statutory provision that affords such a remedy to the effect that "the court may also, in its discretion, allow a party to file his pleadings after

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the time limited therefor; and shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceedings on complaint or motion filed within two years.” §405 Burns 1908, §396 R. S. 1881.

Appellant Virgil E. Houser seeks relief under the foregoing statute. The motion for relief, after setting out facts

which if proven would have been sufficient to con-

9. stitute a defense to the action, assigns substantially the following reasons why the relief should be granted: (1) That the court exceeded its authority in taking steps in said proceeding after the filing of said motion for a change of venue. (2) That the court did not give reasonable time within which to answer the interrogatories, to the effect that notice to appellant’s attorney that said order had been entered was delayed, and that said attorney met with difficulty in endeavoring to communicate with appellant, and that a diligent effort had been made to comply with said order. That said attorney was in court at five minutes after nine, June 29, and was first able to get the attention of the court at 9:15, and was then informed that appellant’s pleadings had been stricken out and judgment entered. (3) That the court was too severe in the exercise of its discretionary power in striking out said pleadings, etc., and in “refusing to allow defendant to file said answers to interrogatories fifteen minutes after 9:00 a. m.” While complaint is made of a refusal to permit said answers to be filed, there is no averment and the record does not otherwise show that there was any offer to file them or that they

had in fact been prepared. However, it will be ob-

10. served that the reasons assigned for relief from said judgment might have been more appropriately urged in an application for an extension of the time given to file said answers or as to some of said reasons, in a motion to vacate said order, if appellant believed that the court did not have authority to enter it. The former remedy is ex-

pressly recognized, in proper cases, by said quoted statutes. §§405, 410 Burns 1908, §§396, 401 R. S. 1881, expressly confer authority on the court to grant an extension of time in matters such as we are considering here.

9. Appellant Virgil E. Houser had notice of said order at 4:00 p. m. and his attorney at 9:00 a. m. on the day before the judgment was entered. Both knew that the order was to the effect that said answers must be filed by 9:00 a. m. the next day. The excuse for not complying with said order is that the time granted was not sufficient. If this be true, it did not justify an ignoring of the order, but rather required the exercise of diligence on the part of the appellant Virgil E. Houser in procuring an extension of time before it had expired. The question of the sufficiency of the time was for the court to determine, rather than for appellant. The facts set out do not show either mistake, inadvertence, surprise or excusable neglect, within the meaning of the statute. To entitle an applicant to the relief sought here, he must show that he exercised reasonable diligence to prevent the entering of the judgment. *Mutual, etc., Life Ins. Co. v. Ross* (1908), 42 Ind. App. 621, 627, 86 N. E. 506; *Carr v. First Nat. Bank* (1905), 35 Ind. App. 216, 73 N. E. 947, 111 Am. St. 159; *Majors v. Craig* (1896), 144 Ind. 39, 42, 43, N. E. 3. The negligence of the attorney is the negligence of the client. *Carr v. First*

11. *Nat. Bank, supra; Heaton v. Peterson* (1892), 6 Ind.

App. 1, 31 N. E. 1133; *Moore v. Horner* (1896), 146 Ind. 287, 45 N. E. 341; *Kreite v. Kreite* (1884), 93 Ind. 583; *Brumbaugh v. Stockman* (1882), 83 Ind. 583. The court in disposing of the motion found that appellant Virgil E. Houser's attorney had notice of the order, and that no application was made for an extension of time; that said order was made with a view to expediting the business of the court and to avoid interference with other causes then in hearing, and that appellant needlessly failed and neglected to comply with said order, and that there was no reasonable

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excuse for such failure. We hold that the court acted within its authority in overruling said motion. While it is true that where such applications are made to the court, each case must of necessity be determined from a consideration of the particular facts involved, nevertheless, the following have some bearing on this question: *Fitch v. Citizens Nat. Bank, supra*; *Williams v. Grooms* (1890), 122 Ind. 391, 24 N. E. 158; *Jonsson v. Lindstrom* (1888), 114 Ind. 152, 16 N. E. 400; *Freeman v. Paul* (1886), 105 Ind. 451, 5 N. E. 754; *Lake v. Jones* (1874), 49 Ind. 297; *Cooper v. Johnson* (1866), 26 Ind. 247; *Williams v. Kessler* (1882), 82 Ind. 183.

As to the thirteenth assignment, the record does not show that appellant Virgil E. Houser requested the court to fix the amount of the appeal bond or the time in which
12. to file it. Such action on the part of the court was necessary only in case appellant elected to perfect his appeal as a term time appeal. It was within the province of appellant to determine as between such an appeal and a vacation appeal. Appellant has perfected his appeal as a vacation appeal, and he cannot be heard to complain of the nonaction of the court in a matter wherein he should have been the moving party.

There being no error in the record, the judgment is affirmed.

NOTE.—Reported in 104 N. E. 309. As to change of venue, see 74 Am. Dec. 241. See, also, under (1) 29 Cyc. 752; (3) 3 Cyc. 334; (4) 40 Cyc. 164; (6) 2 Cyc. 999, 1000; (7) 14 Cyc. 360; (8) 23 Cyc. 890, 895; (9) 23 Cyc. 930, 937; (10) 14 Cyc. 356; (11) 23 Cyc. 939; (12) 3 Cyc. 252.

HUBER ET AL. v. TIELKING ET AL.

[No. 8,155. Filed January 16, 1914. Motion to Modify Order of Dismissal denied February 26, 1914.]

1. **APPEAL.—Time for Perfecting.**—Under §672 Burns 1908, §633 R. S. 1881, an appeal must be taken within one year from the time the judgment is rendered, but where judgment precedes the overruling of the motion for new trial the time for taking the appeal begins to run from the date of the ruling on such motion. p. 578.
2. **APPEAL.—Assignment of Errors.—Failure to File in Time.—Dismissal.**—The assignment of errors constitutes the complaint on appeal and must be filed within the time allowed by statute, so that where the time for completing an appeal has elapsed without an assignment of errors having been filed, a dismissal of the appeal is required, since the court is without power to extend the time for filing such assignment. p. 578.
3. **APPEAL.—Right to Prosecute Appeal.—Assignment of Errors.—Failure of Coappellant to File.**—The right to prosecute an appeal by one, who has properly perfected same and filed an assignment of errors, is not affected by the fact that a coappellant has failed to file its assignment of errors in time. p. 578.
4. **APPEAL. — Assignment of Errors. — Manner of Presenting.** — By virtue of §696 Burns 1908, §655 R. S. 1881, as well as by Rule 4 of the court, appellant is required to make a specific assignment of errors on the transcript, or on some paper attached thereto, so that an assignment on a detached paper, though filed in time, cannot be considered a proper assignment of errors. p. 579.

From Superior Court of Marion County (79,341); *Vinson Carter*, Judge.

Action between William D. Huber and others and Henry W. Tielking and others. From the judgment rendered, William D. Huber and others appeal. *Appeal dismissed.*

T. J. Moll, J. O. Carson and Clarke & Clarke, for appellants.

Samuel Ashby, for appellees.

LAIRY, C. J.—The decree was rendered in this case on July 9, 1910, and the motions for a new trial were overruled

on September 17, 1910. The transcript was filed in this court on September 12, 1911. On October 6, 1911, the Illinois Surety Company, one of appellants, filed a petition in this court asking leave to file errors, which petition was denied.

It is provided by statute that appeals must be taken within one year from the time the judgment is rendered,

but the courts have held that in case the judgment

1. precedes the ruling upon the motion for a new trial, the time for taking an appeal begins to run from the date on which the motion for a new trial is overruled. §672 Burns 1908, §633 R. S. 1881; *Joyce v. Dickey* (1885), 104 Ind. 183, 3 N. E. 252; *Moon v. Cline* (1895), 11 Ind. App. 460, 39 N. E. 432.

The assignment of errors constitutes the complaint on appeal and it must be filed within the time allowed by the statute. This court has no power to extend the time

2. for perfecting an appeal beyond that fixed by the legislature. No showing however strong can be considered as sufficient to warrant the exercise of a power which the court does not possess. As no appeal was perfected in this case no question is presented for decision.

ON MOTION TO MODIFY ORDER OF DISMISSAL.

LAIRY, C. J.—William Huber and others as trustees file a petition to modify the order of dismissal so as to limit the same to the Illinois Surety Company, for the reason, as claimed, that Huber and others, trustees, filed an assignment of errors within the time allowed by the statute for perfecting a vacation appeal and that they are entitled to have the errors so assigned, considered by this court. If it were true that Huber and others had filed an assignment

of errors and given the proper notice within the

3. time allowed and in the manner provided by the statute, their rights to prosecute this appeal could

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not be affected by the failure of the Illinois Surety Company to file its assignment of errors in time.

The statute and the rules of the Supreme and Appellate Courts require that appellant shall make a specific assignment of error on the transcript or upon some paper

4. attached thereto. §696 Burns 1908, §655 R. S. 1881;

Rule 4, Rules of Supreme and Appellate Courts.

Huber *et al.* trustees, did not assign errors on the transcript or on any paper attached thereto. By this motion our attention is called to a paper purporting to be an assignment of error by these parties which bears a file mark of the clerk of this court under date of September 12, 1911. This paper was found among motions and other papers filed in this case which are contained in a jacket provided for that purpose. It is not attached to the record and cannot be considered as a proper assignment of errors. *Hays v. Johns* (1873), 42 Ind. 505; *Wiggs v. Koontz* (1873), 43 Ind. 430; *Moore v. Hammons* (1889), 119 Ind. 510, 21 N. E. 1111. The motion to modify the order of dismissal is denied.

NOTE.—Reported in 103 N. E. 853; 104 N. E. 314. As to the scope and effect of writs of error, see 91 Am. Dec. 193. See, also, under (1) 2 Cyc. 793; (2) 2 Cyc. 1004; (4) 2 Cyc. 1005.

STUBBS ET AL. v. THE BANKERS LIFE ASSOCIATION.

[No. 7,911. Filed April 16, 1913. Rehearing denied February 26, 1914.]

1. INSURANCE.—*Mutual Benefit Insurance.—Forfeiture for Non-payment of Assessments.*—Where the provisions of an assessment insurance association as disclosed by its articles of incorporation, by-laws and contract of insurance, as well as the provisions of a note required to be executed by the applicant for insurance, relating to what was designated as a "guarantee deposit", though containing language which alone might indicate that each assessment for mortuary purposes should be levied *pro rata* on the "guarantee deposit" of each member, when considered as a whole,

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and in view of the general plan of the association, showed that such was not the purpose of such "guarantee deposit", but that it was designed to guarantee the member's payment of his assessments and as a protection to the beneficiaries of those who did not default in their assessments, a finding and judgment against plaintiff in an action on a certificate issued by such association was correct, where it appeared that the insured died before the maturity of his note given on account of the "guarantee deposit" and without having paid the assessments levied against him, and plaintiff's right to recover was based on the contention that forfeiture was prevented by virtue of the provisions relating to such "guarantee deposit". p. 585.

From Boone Circuit Court; *Willett H. Parr*, Judge.

Action by Mignon Stubbs and another against The Bankers Life Association. From a judgment for defendant, the plaintiffs appeal. *Affirmed.*

Ira W. Sharp, for appellants.

Wiley & Jones and *I. M. Earle*, for appellee.

Guilford H. Deitch and *Frank G. West*, *Amici Curiae*.

ADAMS, J.—This cause was submitted to the court below on an agreed statement of facts. Among the facts so agreed on, essential to a determination of the question presented by the record before us, are the following: Appellee, The Bankers Life Association, is an Iowa corporation authorized to do an assessment life insurance business. It is not organized for pecuniary profit, it has no capital stock, and depends on assessments paid by its members for the settlement of death losses. The appellee was admitted to do business in Indiana prior to May 8, 1908, and on said date issued a certificate of membership to one Fred Graves for \$2,000, in which certificate appellants were named as beneficiaries. On the acceptance of his application, Fred Graves paid the sum of \$14, as a membership fee, into the contingent or expense fund, and executed to appellee his note for \$28, due and payable in four equal instalments, the first instalment falling due October 1, 1909, which note was accepted by appellee in lieu of cash, became applicant's guarantee de-

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posit, and a part of the guarantee fund. The certificate of membership *inter alia* provides that "Upon the failure of the above named member to make any payment due from him to the association at its maturity in January, April, July and October of each year, his guarantee deposit and all other payments made shall be forfeited, and his membership shall thereupon cease." The association insures only its members, and the contract of membership in the association consists of the written application, the certificate issued thereon, the articles of incorporation and the by-laws of the association. Article 2 of the articles of incorporation is as follows:

"The business of this association shall be conducted upon the mutual assessment plan, in which the payment of all assessments shall be secured by a guarantee fund, contributed by each member *pro rata* according to age at entry; this guarantee fund, together with the insurance provided in the certificate of membership and by-laws of the association, to be forfeited upon failure of a member to pay his assessments within the time prescribed by the by-laws of the association, provided, however, that relief from such forfeiture and provision for reinstatement of lapsed members may be made by the Board of Directors."

Art. 10 of said articles of incorporation is as follows:

"Section 1. The funds of the association shall be kept separate and distinct upon the books thereof, and shall be designated as follows, to wit: The Guarantee Fund, the Benefit Fund, the Reserve Fund and the Contingent Fund, and such other funds as the Board of Directors may hereafter establish. Section 2. The Guarantee Fund shall consist of the deposits pledged by each member of the association for the prompt payment of assessments and the said deposit required of each member shall consist of the sum of one dollar for each year of the age of member at date of application, counted at nearest birthday, and may consist of cash or a note at 4 per cent interest, payable on such terms as the Board of Directors may prescribe, and the said Board shall have the power to declare a certificate of membership void and of no effect upon defalcation of

payment for any note executed for said deposit. Section 3. The benefit fund shall consist of all moneys collected for the payment of losses occasioned by the death of members of the association, and shall be collected by *pro rata* assessments levied by the Board of Directors upon the guarantee fund of the association. Section 4. The reserve fund shall consist of all guarantee deposits forfeited to the association by lapsed members, and the interest accruing from all funds of the association of whatever nature; all gains, discounts, and margins realized on sale of bonds and mortgages on real estate taken under foreclosure or otherwise and all unused surplus arising from the contingent fund and all other sources. This reserve shall be set apart as an emergency fund for the purpose of providing for death losses in excess of one per cent per annum of the membership of the association, and for the further purpose of temporary advances for the payment of death losses when the benefit fund is exhausted. Section 5. The contingent fund shall consist of all moneys collected for the purpose of defraying the expenses connected with the transaction of the business of the association, and shall be composed of the membership fee, a sum equal to fifty per cent of the guarantee deposit of each member, to be paid on admission, and an annual tax of ten per cent on the guarantee deposit for expenses, to be collected in such installments and at such times as the Board shall direct, provided, that the Board may increase these fees and annual expense items at their discretion, but no such increase shall affect members admitted prior thereto. Section 6. Each fund shall be used expressly for the purpose indicated in the foregoing sections of this article respectively, and no appropriation shall be made of one fund for the purpose of paying a claim upon another, except as provided in section 4 of this article."

Section 6 of Art. 1 of the by-laws of the association is as follows:

"Certificates of membership in this association shall be issued and accepted by the members as quarterly term contracts between the association and the members, and shall take effect only on the day received by the member and on condition that he be then in good health and shall be renewable at the option of the members by payments in advance before expiration, and

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shall continue only during the term for which payment has been made. * * *

Section 2 of Art. 3 of the by-laws of said association is as follows:

“Each assessment shall be levied *pro rata* on the guarantee deposit of each member, and shall be due and payable either in January, April, July or October, unless otherwise specified in the notice of assessment, and in addition to claims then unprovided for, may provide funds in advance for payment of claims to be anticipated in the ensuing three months, or any fraction thereof.”

Section 1 of Art. 4 of the by-laws of said association is as follows:

“No personal liability, beyond the payment of the amount due on guarantee notes is incurred by becoming a member of this association. All other payments are at the option of the member, and shall continue only so long as he shall desire to keep his membership in force. In case of its termination by lapse or otherwise, he shall be liable for no further payment provided the notes given for the guarantee deposit shall have been paid.”

Section 2 of Art. 4 of the by-laws of the association is as follows:

“Upon the failure of any member to pay any assessment or expense dues or note within the time and at the place required, his membership shall be thereby forfeited, and his right to any share or interest in the funds or property of the association shall cease absolutely at the expiration of the time stipulated in which such payments are required to be made, and all payments shall be forfeited to the association.”

Section 5 of Art. 4 of the by-laws of the association is as follows:

“In the event that assessments are not paid promptly, the allowance to beneficiary of deceased members shall not thereby be impaired or lessened, but the sum of such arrears shall be taken from the reserve fund, and restored eventually by collection of arrearages or for-

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feiture of the guarantee deposit as provided in section 2 of this article.”

Section 1 of Art. 6 of the by-laws of said association is as follows:

“Upon the death of any member while in good standing in the association, the guarantee deposit or pledge given by him to the association shall be returned to his beneficiary.”

At the time of making application for membership in appellee association, Fred Graves was twenty-eight years of age. He did not make a guarantee deposit in cash, but executed his note for twenty-eight dollars, pursuant to §2, Art. 10 of the articles of incorporation, which note is in the words following:

“Thorntown, Ind., April 27, 1908. For value received, I promise to pay to the Bankers Life Association, at Des Moines, Iowa, the sum of twenty-eight dollars, with semi annual interest at four per cent per annum, payable in April and October of each year. This note is payable in four equal installments, to become due as follows: One-fourth in October, 1909; one-fourth in April, 1910; one-fourth in October, 1910; and the other fourth in April, 1911, and payment at any depository of the association shall operate as a full release of the maker hereon. It is given for insurance, and as a pledge that I will maintain my membership in the association. It is not negotiable, and becomes void in the event of my death before maturity, but in case of lapse of membership, I agree that all unpaid installments shall at once become due. Depository No.
\$28.00

(Signed) Fred Graves.”

No part of this note was ever paid, as Fred Graves died on May 1, 1909, before the first instalment thereof matured. In December, 1908, appellee levied assessment call No. 103 on the members of the association for the benefit and expense funds, which assessment was due and payable during the month of January, 1909. The amount of Fred Graves' assessment was \$2.80, for the benefit or mortuary fund and

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\$1.40 for the expense fund. The assessment was payable at the Home National Bank of Thorntown, Indiana, a duly authorized depository of appellee. Fred Graves did not, nor did any one for him at any time, pay the amount of said assessment, unless the deposit of the note for \$28 by Graves, held by appellee, as a part of the guarantee fund, constituted such payment.

The single question presented to the court below was whether appellee, on the failure of Fred Graves to pay the mortuary and expense assessment during the month 1. of January, 1909, should have paid the assessment out of his guarantee deposit instead of forfeiting his membership as was done. The finding and judgment of the trial court was in favor of appellee, and the error relied on for reversal in this court is the overruling of appellants' motion for a new trial.

It is manifest that the case turns on the construction to be given to the note itself, to the certificate, to the articles of incorporation and to the by-laws of the association. It is insisted by appellants that §3, Art. 10 of the articles of incorporation provides that mortuary assessments shall be levied *pro rata* upon the guarantee fund of the association; that the note given by the decedent in this case recites that it is given for insurance, and that §2, Art. 3 of the by-laws requires that each assessment shall be levied *pro rata* on the guarantee deposit of each member. We think the words used in the note, as well as in the sections indicated are not apt, and, considered independently, might give rise to serious doubt as to the meaning intended. But when the general plan of the association, as well as the articles of incorporation and the by-laws pertaining to the guarantee deposit are considered together, there can be no doubt as to the meaning of the various sections or the purpose of the guarantee deposit. It is expressly provided that it becomes a part of the guarantee fund, and that each fund shall be used only for the purpose indicated in the charter.

By §1, Art. 6 of the by-laws, it is provided that on the death of any member in good standing, the guarantee deposit or pledge given by him to the association, shall be returned to the beneficiary. If the articles and by-laws should be construed and held to permit the payment of mortuary assessments from the guarantee fund, which is wholly made up of the guarantee deposits of members in good standing, that fund might be exhausted, and without any provision for the reimbursement of the same by assessments levied against members, there could be no return of the guarantee deposits to beneficiaries. Without the guarantee fund, held as a pledge and as an inducement to members to continue in good standing, and transferred to the reserve fund on forfeiture of membership for nonpayment of assessments, the strength of the association would be speedily dissipated. As we see it, this guarantee fund is the distinguishing feature of appellee association—the feature which gives it permanence and stability.

The question presented by the record before us is not, however, one of first impression. The same question was considered by the Supreme Court of Minnesota, in the case of *Mee v. Bankers Life Assn.* (1897), 69 Minn. 210, 72 N. W. 74, wherein the court, speaking of the payment of an assessment of a member out of a guarantee deposit, said: “The right was given to the association to appropriate the amount deposited in payment of death claims should the member so depositing default as to the assessments, but this provision was for the benefit of beneficiaries of those who did not default, not for the benefit of the depositing and defaulting member. Such a provision did not operate to keep alive and in force a lapsed certificate, or to continue a membership. If it could be given that effect, and it be held that membership continued so long as the amount deposited was not fully exhausted in meeting assessments, a premium would be offered to the members who declined to meet their assessments. The certificates became worth-

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less when the membership ceased, and by the plain provision of the articles the membership ceased when annual dues or a mortuary call became due and were unpaid. From all of the articles, and taking into consideration the general plan of the association, we have no doubt as to the construction to be placed upon those portions of the articles relating to the deposit fund, and that a defaulting member has no interest therein." To the same effect is the case of *Hoover v. Bankers Life Assn.* (1912), 155 Iowa 322, 136 N. W 117.

Counsel for appellant press upon our attention the case of *Purdy v. Bankers Life Assn.* (1903), 101 Mo. App. 91, 74 S. W. 486. This was a case wherein the question presented related primarily to the right of the directors of appellee to forfeit the membership of Purdy on account of his intemperate habits. The court held that "The articles of defendant contemplated no forfeiture of a certificate by the decision of the directors, for anything except defaulted payments, and if a member kept his assessments paid, he stood free from risk of losing his insurance save by the judgment of a judicial court." Following this clear statement, the court proceeded to hold that the guarantee fund could be used for the payment of assessments, saying "Contrary to the assertion of defendant's counsel, the articles of incorporation state that the guarantee fund is to pay assessments: 'The guarantee fund shall consist of deposits pledged by each member of the association for the payment of assessments and the said deposit required of each member shall consist of the sum of one dollar for each year of age of the member at the date of the application.' " It will be noted that the words now used in the articles defining the guarantee fund are that the fund "shall consist of the deposits pledged by each member of the association for the prompt payment of assessments." But assuming that the change is not material, still we are unable to reconcile the apparent conflict in the court's holdings. Again in the same opinion, the court said: "Defendant's counsel say

that the guarantee fund is not used for the payment of assessments, but only as the basis on which to compute their amount, citing *Mee v. Bankers Life Assn.*, *supra*. That case is quite different from the one at bar; for it appears therein that mortuary benefits were provided for by the by-laws to be collected by assessments from the members, and that the so-called guarantee fund was simply a pledge for the payment of assessments. The forfeiture was upheld in that case, because the assured had failed to pay his assessment when called for in accordance with the by-laws.” We think the court failed in its attempt to distinguish the case before it from the *Mee* case. It is apparent that the *Purdy* case is in direct conflict with the *Mee* case.

Five years later, appellee was again before the same court in the case of *McCoy v. Bankers Life Assn.* (1908), 134 Mo. App. 35, 114 S. W. 551, in which the question presented was the status of the association as an assessment company. The court said: “The plan of the association is that each applicant at entry pays to the association a sum equal to one dollar for each year of his age, which is placed in what is called the guarantee fund. If he dies a member, the sum is paid to his beneficiary, in addition to the two thousand dollars mentioned in the certificate. If he fails to pay his expense dues or assessments within the time provided, the membership terminates, and this sum is forfeited to the association.” Again in the case of *Smoot v. Bankers Life Assn.* (1909), 138 Mo. App. 438, 468, 120 S. W. 719, the same court said: “The contract in terms provides that failure to pay at the time stipulated, subjects the membership and the contract to forfeiture. The proof shows, in fact, the plaintiff’s own acts and letters admit failure to pay the assessment due in April within that month. The failure produces the forfeiture; it requires no act of the defendant to declare it. Forfeiture fell in by the failure to pay.” A striking circumstance is that in neither

the McCoy case nor the Smoot case was any reference made by the court to the Purdy case.

In the case at bar, the trial court was clearly right in holding that Graves' membership was forfeited by his failure to pay the mortuary assessment levied in December, and payable during the month of January, 1909.

The judgment is affirmed.

NOTE.—Reported in 101 N. E. 638. As to features of the law specially applying to mutual life insurance, see 52 Am. St. 543. See, also, 29 Cyc. 177.

WOLF v. AKIN.

[No. 8,236. Filed February 27, 1914.]

1. **APPEAL.**—*Briefs.*—*Points and Authorities.*—*Evidence.*—No reversible error was presented on the assignment that the court erred in overruling the motion for new trial, where the specifications of the motion relied upon were that the verdict was not sustained by sufficient evidence and that it was contrary to law, and appellant failed to indicate in his brief the application of the points and authorities therein contained, and failed to set out a condensed recital of the evidence in narrative form. p. 590.

From Sullivan Circuit Court; *William H. Bridwell*, Judge.

Action by Charles T. Akin against Mayme Wolf. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Thos. J. Wolfe and *W. R. Nesbit*, for appellant.

Arthur Denny Cutler, for appellee.

HOTTEL, J.—This is an appeal from a judgment recovered by appellee on a note executed to him by appellant and Andy Fisher. There was a trial by jury resulting in a verdict for appellee in the sum of \$140.

Appellant, in his brief, states that the sole issue in the case was whether appellant executed the note as principal or surety and, that the only error assigned in this court

is the overruling of appellant's motion for a new
1. trial. On this statement in such brief, we are asked
by appellee to dismiss the appeal on the ground that
neither said motion for a new trial nor its substance is
set out in appellant's brief. The only reference to the
grounds of such motion which we find in the brief is in the
argument where it is stated that "the motion for a new
trial which was overruled by the court, to which ruling the
appellant excepted, was based on three reasons, first, that
the verdict was not sustained by sufficient evidence, second,
that it was contrary to law, the third was waived by the
appellant." Assuming without deciding that this is suffi-
cient to supply the defect in the brief urged by appellee
and, that it shows that one of the grounds of such motion
is that of the sufficiency of the evidence to sustain the ver-
dict, other failures of appellant to comply with the rules
of this court prevent a reversal of the case. One require-
ment of Rule 22 is as follows: "The brief shall contain,
under a separate heading of each error relied on, separately
numbered propositions or points, stated concisely, and with-
out argument or elaboration, together with the authorities
relied on in support of them * * *. No alleged error
or point, not contained in this statement of points, shall be
raised afterwards, either by reply brief, *or in oral or printed
argument*, or on petition for rehearing."

There is nothing in said brief under the heading, "Points
and Authorities" to indicate what error, if any, is relied
on, to which such points and authorities are directed and
intended to apply. We can only infer from the statement
above quoted, found in the argument, that they are intended
to apply to one of the two grounds of the motion for a
new trial there indicated; and where the insufficiency of the
evidence is the ground of the motion for new trial relied on
for reversal, clause 5 of said rule of this court, requires that
appellant's brief shall "contain a condensed recital of the
evidence in narrative form so as to present the substance

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clearly and concisely.” Appellant’s brief does not measure up to the requirements of this provision of said rule, as construed by both this and the Supreme Court; and this court could not on the showing made in such brief say, that there should be a reversal of the judgment on account of the insufficiency of the evidence to sustain the decision of the trial court.

On account of said defects and omissions in said brief, appellant has failed to present to this court any reversible error. *Pittsburgh, etc., R. Co. v. Greb* (1905), 34 Ind. App. 625, 632, 633, 73 N. E. 620; *Welch v. State, ex rel.* (1905), 164 Ind. 104, 107, 108, 72 N. E. 1043; *Chandler Coal Co. v. Sands* (1908), 170 Ind. 623, 630, 85 N. E. 341; *Conner v. Andrews Land, etc., Co.* (1904), 162 Ind. 338, 350, 70 N. E. 376; *State, ex rel. v. Board, etc.* (1906), 167 Ind. 276, 287, 288, 78 N. E. 1016.

Judgment affirmed.

NOTE.—Reported in 104 N. E. 308. See, also, 2 Cyc. 1013, 1017.

UNITED STATES HEALTH AND ACCIDENT INSURANCE COMPANY v. EMERICK.

[No. 8,096. Filed December 12, 1913. Rehearing denied
February 27, 1914.]

1. REFORMATION OF INSTRUMENTS.—*Parol Evidence.*—*Modifying Contract.*—While as a general rule previous oral negotiations or stipulations between the parties are merged in the written contract and cannot be shown to modify it, they may be shown in case of fraud or mistake which prevented the writing from expressing the real contract. p. 594.
2. INSURANCE.—*Action on Policy.*—*Complaint.*—*Sufficiency.*—*Reformation of Policy.*—A complaint on a policy of insurance alleging that defendant solicited the insured to take an accident policy in consideration of an assignment of his wages, which insurance should be effective from date of application, and that thereafter defendant mailed to him a policy containing all the terms agreed to, except that by the mutual mistake of defendant and insured the date of the policy was fixed as of a time

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nine days subsequent to the date of application, sufficiently showed that the action was upon the theory that the policy sued on was the contract agreed upon, except as to the matter of date, which by mutual mistake was not the date agreed upon. p. 595.

3. **INSURANCE.—Action on Policy.—Amendment of Complaint.—Estoppel.**—An amended complaint based on the same policy sued on in the original complaint, except that a reformation as to the date of the policy was sought, was not open to the objection that the original complaint based on the policy as written and dated constituted an acceptance thereof so as to prevent plaintiff from afterwards pleading ignorance of its terms. p. 597.

4. **LIMITATION OF ACTIONS.—Commencement of Action.—Amendment.—New Cause of Action.**—In an action on an accident policy, where an amended complaint was filed, based on the policy sued on in the original complaint, except that a reformation as to date of the policy was sought, the filing of such amended complaint was not the institution of a new cause of action, and not open to the objection that it was filed after the limitation provided in the policy had expired. p. 597.

5. **PLEADING.—Amended Complaint.—New Cause of Action.**—Whether an amended complaint sets up a new cause of action may be determined by a determination of the question whether a recovery on the original complaint would bar a recovery under the amended pleading. p. 598.

6. **APPEAL.—Review.—Findings.—Conclusiveness.**—In an action to recover on a policy of insurance, in which a reformation as to the date of the instrument was sought, the finding of the trial court that the date shown in the policy was the result of mutual mistake cannot be disturbed on the weight of the evidence, where there was evidence sufficient to warrant such finding. p. 598.

7. **APPEAL.—Briefs.—Waiver of Error.**—Grounds of appellant's motion for a new trial that are not stated or discussed in its brief on appeal are waived. p. 599.

From Marion Circuit Court; *Charles Remster*, Judge.

Action by Nellie R. Emerick, by her next friend, James H. Amsden, against the United States Health and Accident Insurance Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

R. P. Shorts and *G. R. Estabrook*, for appellant.

Williams & Schlosser and *William Amsden*, for appellee.

HOTTEL, P. J.—Appellant, on and prior to July 11, 1908, was doing business as an accident and life insurance com-

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pany in the city of Indianapolis, with its principal office at the city of Saginaw, Michigan. On said day, Robert H. Emerick, then in the employ of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, was solicited by one of defendant's agents to take out a policy of insurance in said company with the result that such agent then and there filled out an application blank of said company for insurance for Emerick. To pay the premiums for such insurance, Emerick then signed and delivered to appellant's agent a written assignment of wages.

On July 15, 1908, Emerick was accidentally thrown from a moving freight train and struck by the trucks of one of its cars, with the result that his back was broken and he was otherwise injured. On July 20, 1908, appellant mailed to Emerick, from its home office, a policy of insurance bearing date of July 20, 1908, which was received by Emerick on July 21, 1908. On July 21, 1908, Emerick caused to be filled out the company's blank preliminary report and doctor's certificate pertaining to his injury and disability, resulting therefrom, which report was mailed to appellant on the afternoon of July 21, 1908, and received by appellant July 23, 1908. On July 25, 1908, appellant wrote Emerick a letter in which it acknowledged the receipt of such preliminary report and doctor's certificate of injury, and at the same time and in the same letter mailed to Emerick necessary blanks to be filled and returned to it at the termination of disability. On July 31, 1908, the insured died from the effects of the injury, leaving his widow Nellie R. Emerick, who was then under twenty-one years of age and the sole and only beneficiary of said policy of insurance. On December 9, 1908, the appellee, by her next friend James H. Amsden, filed in the circuit court of Marion County the original complaint herein, which was an action on the policy of insurance bearing date of July 20, 1908, and proceeded on the theory that such policy of insurance

was in force from twelve o'clock noon July 20, 1908. On November 3, 1909, an amended complaint in two paragraphs was filed. In the first paragraph the appellee sought to correct and reform the policy of insurance as to date, and as grounds therefor, alleged, that by mutual mistake of the parties such policy was dated July 20, 1908, instead of July 11, 1908, as was agreed and intended by both parties.

The second paragraph also sought a reformation of the date of the policy and alleged fraud on the part of appellant in dating it July 20, 1908, instead of July 11, 1908. Judgment for \$1,000 on such policy as reformed was asked in each paragraph. A demurrer to each of these paragraphs was overruled. There was an answer in two paragraphs one of which was a general denial. A demurrer to the affirmative answer was overruled, and a reply in denial closed the issues. There was a trial by the court, and a general finding and judgment for appellee on her first paragraph of amended complaint, and a general finding for appellant on the second paragraph of amended complaint.

A motion for new trial filed by appellant was overruled. Proper exceptions were saved by appellant to the court's rulings on its demurrer to the amended complaint and motion for new trial, and such rulings are separately assigned as error and relied on for reversal. The general finding and judgment conclusively show that the judgment herein was rendered on the first paragraph of the amended complaint, and that there was a finding for appellant on the second paragraph of complaint. Hence, we need give no further consideration to the second paragraph of complaint.

In support of its contention that the trial court erred in overruling its demurrer to the first paragraph of amended complaint appellant insists, in effect, that such para-

1. graph is based on a parol contract for insurance, which its averments show was afterwards merged in a written contract, and that "all oral negotiations or stipu-

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lations between the parties which preceded or accompanied the execution of the written contract are to be regarded as merged in it, and that the latter must be treated as the exclusive medium of ascertaining the contract between the parties.” There is no doubt but that the general rule, with reference to the merger of the previous parol negotiations in the subsequent written contract, is substantially as appellant states it; but the appellate courts in stating such rule almost invariably indicate an exception thereto, viz., that such “previous negotiations and propositions in relation to such contract are merged in the final agreement, and, *in the absence of fraud or mistake*, cannot be given to vary or modify such written agreement.” *Cole v. Gray* (1894), 139 Ind. 396, 38 N. E. 856; *Smith v. McClain* (1896), 146 Ind. 77, 87, 45 N. E. 41.

Appellee by her first paragraph of amended complaint brings herself within the exception indicated. The aver-

ments of this paragraph necessary to a presentation

2. of the foregoing, and other objections urged against it are, in substance, as follows: Appellant, on July 11, 1908, solicited Robert H. Emerick to take insurance of it, and on the same day, in consideration of the written assignment of wages, executed and delivered to it by Emerick, on the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, for the sum of \$7.60, then due, then and there agreed to insure, and did insure Emerick from July 11, 1908, until September 11, 1908. Appellant agreed and contracted with Emerick as above set out and agreed that the insurance should become effective and in force on July 11, 1908, and agreed to furnish Emerick a policy of insurance containing their agreement of the character and kind and containing the terms as set out in exhibit A hereto attached and made a part hereof, save and except said policy, according to their agreement, was to be dated July 11, 1908, and to be in full force and effect from July 11, 1908. The terms of the contract of insurance were and

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are in form and substance as set out, and shown by exhibit A which exhibit A and contract of insurance are alike in all particulars save and except the date of exhibit A which instead of being of date of July 20, 1908, as contained therein, should be July 11, 1908, as provided in the original agreement made on July 11, 1908. In compliance with its agreement with Emerick to furnish a policy of insurance containing the date of July 11, 1908, to become effective from said date, appellant, on July 20, 1908, executed and mailed to Emerick a policy of insurance which was received by him on July 21, 1908. Such written policy of insurance, a copy of which is attached hereto, marked exhibit A contained all the agreements and terms agreed upon on July 11, 1908, by and between Emerick and appellant, "save and except by the mutual mistake of the said * * * Emerick and defendant, said policy was dated July 20, 1908." Emerick had a broken back and was otherwise injured and on account thereof was compelled to remain in bed from the time of his injury until his death, and suffered great pain both of mind and body. Emerick, by reason of his condition, was unable to attend to business, and unable to discover, and did not discover, the mistake as to the date written in the policy, and at all times believed that the policy was written and dated as of July 11, 1908, as agreed upon, and that the agreement of insurance was in full force from July 11, 1908. On July 25, 1908, appellant, by written letter, notified Emerick that it had received his preliminary report and doctor's certificate pertaining to his disability and mailed to him necessary blanks to be filled and returned to it after the termination of his disability, and "did thereby, then and there treat and consider said insurance as in force, and did thereby waive all objections to said insurance on account of any of the terms and conditions of said policy" and appellant did at all times, until the death of Emerick, treat the insurance as in full force and effect and as covering and insuring against said injuries.

These averments make certain the theory of this paragraph of complaint, viz., that the written contract sued on is the contract agreed upon by the parties, except in the matter of date, and that by the mutual mistake of the parties such contract was dated July 20, 1908, when it was intended and agreed between them that it should bear date of July 11, 1908. A reformation of the contract so as to make it bear the correct date and judgment on the written contract as reformed is asked.

It is also insisted that the filing of the original complaint, based on the policy as written and dated, was an acceptance

by the beneficiary of such policy as written, and that

3. she cannot thereafter plead ignorance of its terms, nor avoid it because it is not in accord with some former agreement. Appellee is not seeking to avoid the policy, but on the contrary seeks to enforce it when reformed. The authorities relied on by appellant are not applicable to the facts averred in the paragraph of complaint here involved. It is further insisted that neither appellee nor the insured attempted "to rescind this written contract of insurance issued July 20, 1908, with reasonable promptitude and thereby affirmed the contract." So far as the pleadings in the case show there is not now, and never has been any effort to rescind the contract of insurance evidenced by the policy sued on. On the contrary, appellee affirms and seeks to enforce the contract when it is reformed and corrected in the matter of date. The averments of the complaint, before set out, show that the condition of the insured after his injury was such that he was never able to and did not in fact discover the mistake in the date of the policy.

The policy sued on contains the following provision:

"No action at law shall be maintainable before three months nor after six months from date on which this para-

4. graph requires said proofs to be furnished. Any claim not brought in conformity with the require-

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ments of this paragraph shall be forfeited to the company.” It is contended by appellant that, while the original complaint was filed within the time stipulated in the provision of the policy, appellee, by filing her amended complaint on November 3, 1909, changed the action to an equity proceeding, based on an independent and different contract; that this was the equivalent of filing a new cause of action, and that such action was not filed within the time limit above provided, and that on this account “the policy was forfeited to the appellant”. There is no merit in this contention. Each paragraph of the amended complaint was predicated on the same policy of insurance sued on in the original complaint. The fact that a reformation of the contract originally sued on was asked in the amended complaint did not change the cause of action and, hence, the amendment will be treated as of the date of the filing of the original complaint. *Indiana Union Traction Co. v. Pring* (1912), 50 Ind. App. 566, 96 N. E. 180, and authorities there cited. “To determine whether an amendment of

5. the complaint will set up a new cause of action,

* * * it is a fair test to inquire whether a recovery on the original complaint would be a bar to a recovery under the amended pleading.” *Blake v. Minker* (1894), 136 Ind. 418, 426, 36 N. E. 246. See, also, *Indiana Union Traction Co. v. Pring, supra*.

The first paragraph of amended complaint is sufficient to withstand the objections urged against it and, hence, no error resulted from the ruling on the demurrer thereto.

In support of its contention that the trial court erred in overruling its motion for a new trial, it is contended by appellant that the decision of the court is not sustained by sufficient evidence, and is contrary to law.

Authorities are cited to the effect that in order to justify the reformation of a written contract the evidence must be strong, clear, and convincing. These authorities should have been, and doubtless were given careful consider-

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ation by the trial court. The only reformation sought in this instrument was the change of its date. There was evidence tending to show that it was agreed and understood by the insured and the agent, who took his application, that the policy of insurance would bear the date of the application, and be in force from twelve o'clock noon of the day that the insured assigned his wages in payment of the premium, and that such agent had authority to agree that the policy when issued would bear such date. There was other evidence from which the trial court might have very properly inferred that the appellant and the insured both treated the policy as bearing such date. From such evidence the trial court was warranted in inferring that the date of the policy was the result of the mutual mistake of the parties. It is well understood that this court will not weigh evidence, and that, where there is any evidence to support each of the essential facts upon which the decision of the trial court must rest, such decision will not be dis-

turbed by this court. The other grounds of appel-

7. lant's motion are not stated or presented anywhere in its brief, and are therefore, waived.

Judgment affirmed.

NOTE.—Reported in 103 N. E. 435. As to parol evidence of contemporaneous agreement, see 11 Am. St. 394, 893. See, also, under (1) 17 Cyc. 695; (4) 25 Cyc. 1305; (5) 31 Cyc. 417; (6) 3 Cyc. 360; (7) 3 Cyc. 388.

FISHER v. SOUTHERN RAILWAY COMPANY ET AL.

[No. 8,254. Filed March 10, 1914.]

1. NEW TRIAL.—*Supplemental Motion.—Time for Filing.*—At any time during the term at which a verdict or decision was rendered, a party may be permitted, on proper showing, to file a supplemental motion for new trial, or additional causes, which by due diligence he did not discover until after filing the original motion. p. 602.
2. NEW TRIAL.—*Supplemental Motion.—Time for Filing.*—Under §1, Acts 1911 p. 604, which provided that a motion for a new trial

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could be made on or before the second Monday of the next term of court where the verdict or decision was rendered during the last ten days of the preceding term, a party against whom a verdict had been rendered less than ten days before the close of a term, and who on the same day filed a motion for new trial, was entitled to file a supplemental motion on the first judicial day of the succeeding term for a cause discovered after the trial term and not stated in his original motion. pp. 602, 603.

3. **NEW TRIAL.—Cause Discovered After Term.—Statutes.**—Section 589 Burns 1908, §563 R. S. 1881, providing that application for a new trial may be made by complaint not later than the second term after discovery of the cause therefor, nor more than one year after the final judgment was rendered, was intended to apply only to cases where the causes were discovered after the trial term and beyond the time allowed for the filing of a motion for new trial. p. 603.
4. **NEW TRIAL.—Motion.—Additional Causes.—Withdrawal of Motion.**—An applicant for a new trial may withdraw his motion and file a new motion containing additional causes within the time allowed for filing the original motion. p. 603.
5. **NEW TRIAL.—Motion.—Effect of Supplemental Motion.**—Where the original motion for a new trial is pending, a supplemental motion filed within the time allowed for filing the original motion becomes a part of such original motion. p. 603.
6. **APPEAL.—Assignment of Errors.—Ruling on Supplemental Motion for New Trial.**—Where a supplemental motion for new trial was filed while the original motion was pending and within the time allowed for filing the original motion, an assignment of error based on the supplemental motion was not available, since, the two motions being in effect one only, the assignment should have been based on the original motion. p. 604.

From Dubois Circuit Court; *John L. Bretz*, Judge.

Action by Francis M. Fisher against the Southern Railway Company and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Leo H. Fisher, for appellant.

Alex P. Humphrey, *Edward P. Humphrey*, *John D. Welman*, *Thomas Duncan* and *Richard M. Milburn*, for appellees.

FELT, J.—Suit for damages by appellant against appellees for an alleged obstruction of a small stream by failing to

provide a sufficient outlet through the right of way of said appellees and for obstructing the channel of said stream by rocks, rubbish and other material thrown therein and thereby causing water to back upon and over appellant's land. The issue was formed by a general denial to the complaint and the case was tried by a struck jury which returned a verdict for appellees.

The verdict was returned on June 22, the same being the sixteenth judicial day of the June term, 1911, and on the same day judgment was rendered thereon by the court against appellant for costs. On June 27, being the twentieth judicial day of the term, appellant filed his motion for a new trial. On October 2, being the first judicial day of the October term, 1911, appellant, over the objections of appellees, filed a supplemental motion for a new trial, the substance of which is as follows: That after the adjournment of the court at the close of the term at which the verdict was returned, on July 2, 1911, for the first time, appellant discovered that one of the jurors who tried the case was incompetent because he had been and then was employed by appellees as a watch inspector; that neither appellant nor his attorney had any knowledge of that fact until July 2, 1911; that the juror failed to disclose the fact at the *voir dire* examination, and at the first opportunity, appellant "presents the foregoing and asks that the same be made supplementary and a part of his original motion for a new trial herein". On October 25, being the twenty-first judicial day of the October term, 1911, the court overruled appellant's motion for a new trial, and also his supplemental motion. The only error assigned is that the court erred in overruling the supplemental motion for a new trial.

The first question for this court is to determine whether by such assignment, any question is presented for decision. If no question is duly presented the presumption in favor of the action of the trial court compels the affirmance of the judgment. Our statute provides that "application [for a

new trial] may be made by complaint filed with the clerk
* * * on which a summons shall issue'' where causes for
a new trial are discovered after the term at which the verdict
or decision was rendered (§589 Burns 1908, §563 R. S.
1881), but the proceeding here is not under this provision
of the statute. It has been held that during the term

1. at which the verdict or decision was rendered, a
party, on proper showing, may be permitted to file a
supplemental motion, or additional motions for causes,
which by due diligence he had not discovered until after
the filing of the original motion. *White v. Perkins* (1861),
16 Ind. 358, 360; *Greenup v. Crooks* (1875), 50 Ind. 410,
416; *Dennis v. State* (1885), 103 Ind. 142, 147, 2 N. E. 349;
Baltimore, etc., R. Co. v. Ray (1905), 36 Ind. App. 430, 433,
73 N. E. 942.

By §1, Acts 1911 p. 604, which was in force when this
motion was filed, it is provided that a motion for a new
trial may be made on or before the second Monday of the
next term of court where the verdict or decision was

2. rendered during the last ten days of the preceding
term. The verified supplemental motion does not
state that the verdict was returned within the last ten days
of the June term, but if it does disclose that on July 2, and
after the adjournment of said term, appellants discovered
the alleged cause for a new trial set up in the supplemental
motion. As the verdict was returned on June 22, it must
have been within the last ten days of the regular June term.
The term began on the first Monday of June and continued
for four weeks which in 1911 would expire on the first day
of July. Appellant's supplemental motion was filed on
the first judicial day of the succeeding term and the ques-
tion therefore arises whether on such a state of facts he
might file a supplemental motion for a new trial for a cause
discovered after the term and not stated in his original
motion. Had appellant not filed any motion for a new trial
at the June term and filed his original motion when he filed

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his supplemental motion, under the statute then in force he would have been in time. As already shown, we have a statute which makes provisions for causes discovered after the term which states that "application may be made by complaint not later than the second term after the discovery" nor "more than one year after the final judgment was rendered." Therefore the question arises whether appellant had the right to supplement his original motion within the time allowed by the statute for filing such motion, by adding thereto a cause discovered after the term, but within the time allowed for the filing of a motion for a new trial. It is apparent that the statute authorizing the

granting of a new trial on complaint was intended

3. to apply only to cases where the causes were discovered after the term and beyond the time allowed for the filing of the motion for a new trial and for causes which in the exercise of due diligence could not have been discovered in time to have been available as ground for the usual motion. Appellant could have withdrawn his

4. original motion and presented a new motion including the additional ground, and filed it on or before the second Monday of the October term. 14 Ency. Pl. and Pr. 948. We see no good reason why such additional cause should not be presented within the time allowed by

2. the statute for filing the motion. The original motion was still pending when the supplemental motion was filed and the prayer is that it be made a part of the original motion. On such facts there was but one motion for a new trial after the supplemental motion was

5. filed, for the office of a supplemental pleading is to supply something additional to the original of which it becomes a part. The authorities cited seem to sustain the proposition that where a motion for a new trial has been overruled at the term at which the verdict or decision was rendered, and thereafter, but within the same term or the time allowed for filing such motion, an additional cause for

a new trial was discovered and duly presented, the court would be required to make an independent ruling on such subsequent motion, and the same would not be treated as supplemental in character, but as an additional motion, which in the judicial discretion of the trial judge might be entertained and ruled on as an independent motion, on which error might be predicated. But such is not the case here, for the original motion was pending and undisposed of when the supplemental motion was filed and presented.

In such case, the supplemental motion became a part

6. of the original motion and to present any question to this court on the ruling on the motion for a new trial, error must have been assigned on the original motion. The assignment of errors is the complaint of appellant on appeal and it has been held that a supplemental complaint is not demurrable, because under our practice a demurrer will not lie to a part of a pleading, and a supplemental pleading is but a part of the original. 8 Words and Phrases, 6790; *State, ex rel. v. Board, etc.* (1908), 170 Ind. 133, 137, 83 N. E. 83, and cases cited; *Big Creek Stone Co. v. Seward* (1896), 144 Ind. 205, 209, 42 N. E. 464, 43 N. E. 5; *Farris v. Jones* (1887), 112 Ind. 498, 500, 14 N. E. 484; *Eckert v. Binkley* (1893), 134 Ind. 614, 619, 33 N. E. 619, 34 N. E. 441. We conclude therefore that on the facts of this case the assignment of errors based on the supplemental motion alone presents no question.

Judgment affirmed.

NOTE.—Reported in 104 N. E. 521. See, also, under (1) 29 Cyc. 958; (3) 29 Cyc. 927; (6) 2 Cyc. 1000.

TODD v. GUFFIN, ADMINISTRATRIX.

[No. 8,350. Filed March 10, 1914.]

1. **ASSIGNMENTS.—Contracts Assignable.—Ratification.**—Even if a contract for hoisting or dipping gravel to be used in road construction was of such character as to be nonassignable, where defendant made a payment to the assignee for gravel hoisted or dipped under such contract, he thereby recognized assignee's right thereunder and was thereafter precluded from asserting that it was not assignable. p. 609.
2. **PRINCIPAL AND AGENT.—Death of Agent.—Agency Coupled With an Interest.**—An agency is not terminated by the agent's death where the power is coupled with an interest, so that where an agent held a power of attorney from the original contractor to complete a contract for hoisting or dipping gravel and to collect the money therefor, the power, being coupled with an interest, did not terminate on the agent's death, and his administratrix could recover any amount due under such contract. p. 609.
3. **PAYMENT.—Payment in Full.—Evidence.—Sufficiency.**—In an action by the administratrix of the estate of a deceased assignee, to recover on a contract to hoist or dip gravel, evidence on behalf of plaintiff showing the contract and assignment, that gravel worth at the contract price \$1,056 had been delivered, that only \$528 had been paid, and that there was due the sum of \$528, was sufficient to warrant a finding that the payment made was not a payment in full, notwithstanding evidence that at the time of such payment the assignee surrendered to defendant the power of attorney executed by the original contractor authorizing the assignee to collect all amounts due under the contract, since such evidence was consistent with the theory that the surrender was made to protect defendant against any claim by the original contractor, rather than with the theory that it was equivalent to a surrender of the evidence of the debt. p. 610.
4. **EXECUTORS AND ADMINISTRATORS.—Inventory.—Operation and Effect.**—The fact that an administratrix did not include a certain claim in her inventory of the estate, could not conclude her from recovering thereon and at most could only affect the weight of her evidence in support of the claim. p. 610.

From Hamilton Circuit Court; *Meade Vestal*, Judge.

Action by Matilda C. Guffin, administratrix with the will annexed of the estate of Henry H. Guffin, deceased, against Lemuel S. Todd. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

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Ira W. Christian and Floyd G. Christian, for appellant.
Shirts & Fertig and Gifford & Gifford, for appellee.

IBACH, J.—The complaint was in two paragraphs, the first declaring for a balance due upon a contract between appellee's decedent and appellant, for dipping gravel, the second declaring upon account for the work and labor performed by her decedent in dipping gravel for appellant. There was an answer of general denial and plea of payment, and reply in general denial. The cause was tried by the court. The errors assigned and presented to this court are that the court erred in overruling appellant's motion for new trial, upon the grounds that its decision was contrary to law and not sustained by sufficient evidence, and that the court erred in its conclusions of law upon the facts found.

The finding of facts is in substance as follows: (1) On September 10, 1908, defendant Lemuel S. Todd and Herman Barlow entered into and executed in duplicate a certain contract in writing, of which a copy is set out, and by which Barlow agreed to dip or hoist 4,000 cubic yards of gravel on the Ed Rawlings road, for which Todd was to pay him 27½ cents per yard, eighty per cent to be paid as the commissioners gave estimates on the road, and the remaining twenty per cent as soon as the gravel was dipped. (2) On October 21, 1908, Barlow sold and assigned his gravel dipping machinery and the uncompleted part of said contract and another contract to decedent Henry H. Guffin, by and in accordance with the terms of a certain deed of sale and contract of writing executed between the parties, of which a copy is set out, which states that Barlow sells and delivers all of his hoisting machinery and all his rights, titles, interests and benefits in the said contract between him and Todd above mentioned, and the other contract, and appoints Guffin his agent to act in his stead in the collection of all sums of money accruing under said contracts and authorizes and empowers said Guffin to do the things and perform the

service incumbent upon Barlow in the said contracts, in consideration of which sale and transfer of rights, Guffin pays to Barlow \$1,000 and gives to him his promissory note for \$250, and is to account to him at the rate set out in the contract assigned for the amount of gravel now hoisted, for the measuring of which provision is made. (3) At the time of making said last named bill of sale and contract, said Barlow executed a power of attorney to said Guffin empowering him to collect all sums of money due said Barlow under said contract with Todd, which is in the words and figures following:

“Power of Attorney.

Know All Men By These Presents, That I, Herman Barlow of Johnson County, Indiana, constitute and appoint Henry H. Guffin of Marion County, Indiana, my true and lawful attorney and agent for the fulfillment of a certain contract heretofore entered into on September 10, 1908, with L. S. Todd and also with G. W. Bacon, for the hoisting of gravel, which contract is hereto attached and made a part hereof, and by such power herein granted, I authorize the said Henry H. Guffin to do all of said work therein contracted by me to be done and collect all money under said contract due to me and to receipt for the same in my name and stead, and I bind myself to such acts by him done the same as if I were present and did them myself. Witness my hand and seal this 21st day of October, 1908. Herman Barlow.”

(4) There were dipped from said pit and received by defendant Todd and used in the construction of the Rawlings road in all 3,840 cubic yards of gravel, being all that was required for the completion of the road, which was completed and the final estimate paid to defendant Todd as contracted on September 6, 1909. (5) Of said amount, there were dipped before the execution of said contract and bill of sale to decedent Guffin, 1,049 yards. (6) On December 8, 1908, there was deposited by defendant Todd in the Farmers Bank of Sheridan the sum of \$528 and a certificate of deposit issued therefor in favor of Barlow, and at the same

time the bank made a draft against the deposit in favor of Barlow for the full sum of \$528, which draft was endorsed by Guffin under the power of attorney and paid by the bank December 18, 1908, and applied by Guffin as a payment by defendant on the gravel dipping contract. (7) Barlow has been defaulted in this action and is claiming no interest in the contract on the claim sued on. (8) After completing the dipping of the gravel, Guffin died testate and the plaintiff was appointed administratrix of his estate with the will annexed, by the Probate Court of Marion County, Indiana, and filed on July 16, 1909, with the clerk of the court an inventory of the personal estate of the decedent in which were set forth sundry articles of property, moneys and choses in action, but no claim against defendant was listed therein, and the same was verified by the affidavit of plaintiff that the same was a full, true and complete inventory of all the personal estate of the decedent which had come to her knowledge. (9) No demand was ever made by plaintiff of Lemuel S. Todd, for the amount claimed in the complaint, or for the money due under the contract between Barlow and Todd, nor was any demand of any description ever made of the defendant Todd by the plaintiff, on account of any of the transactions embraced in this suit. (10) The balance due on the account from defendant Todd is \$528, all of which became due on September 6, 1909, and with interest thereon, now amounts to \$576.40. "And the court concludes as a matter of law upon the foregoing facts that said contract of assignment, said bill of sale, and said power of attorney should be and are construed together as an assignment of the claim herein sued for and of the machinery mentioned thereon and a power coupled with an interest empowering the said Guffin to collect all sums due under the terms of said instruments, and that said Guffin became and was the owner of the claim herein sued upon and was such owner at the time of his death. And the court further concludes that the plaintiff is entitled to recover of the defendant,

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Lemuel S. Todd, in the sum of \$576.40 and the costs of this action.”

It is urged that the court erred in holding that the bill of sale and power of attorney constituted an assignment of the contract making Guffin the owner of the claim

1. sued on. Authority is cited to the effect that “everyone has the right to select and determine with whom he will contract, and can not have another person thrust upon him without his consent; and he can not be compelled to accept the liability of any other person or corporation as substitute for the liability of those with whom he had contracted.” It is true that certain contracts involving personal liability or a relation of trust and confidence, or calling for the special skill of one party cannot be assigned by that party, and the other party be bound by the assignment, unless he ratifies it. 2 Elliott, Contracts §1435; *Weatherhogg v. Board, etc.* (1902), 158 Ind. 14, 62 N. E. 477. We do not believe that the present contract is shown to be of such a character that it could not be assigned, but we need not decide that question, for Todd received the benefits of the contract, and in our opinion, the facts show that Todd, by making the payment to Guffin, recognized the power of attorney and recognized Guffin’s right to receive the money due under the original contract.

But, appellant urges, he knew only of the power of attorney, not of the assignment, and paid money to Guffin and recognized his rights under the contract only as the

2. agent of Barlow, and not as the assignee of the contract. We believe that were this true, it would not allow Todd to escape liability in this suit for any unpaid balance due under the contract, since Guffin was by the power of attorney empowered to complete the work and collect the money due. “An agency is not terminated by the agent’s death where the power is coupled with an interest. Such a power may be subsequently exercised, at least so

far as may be necessary to protect the interests of the estate of the agent.” 31 Cyc. 1317.

It is also urged that the evidence showed that the payment made through the Sheridan bank was a final payment.

In this we do not agree. Appellee, under the issues,

3. had the burden of showing the contract, its assignment, its performance on the part of her decedent, and a balance due from appellant. She introduced evidence to prove the contract and the assignment, and showed that 3,840 yards of gravel had been delivered under the terms of the contract, worth at the contract price, \$1,056, and showed a payment of \$528, which would leave a balance of \$528. The burden, under the defense of payment, was then upon appellant to show a payment of this latter amount. He claims that when Guffin left in appellant's possession on December 8, 1908, at which time a payment was made, the power of attorney, this was equivalent to his surrendering the evidence of the debt and shows payment in full. We think rather that this may be taken as showing that appellant desired to keep the power of attorney in order to protect himself, should Barlow claim any right to money under the contract. Other circumstances tending to show that the payment of December 8, 1908 was not a payment in full, are, that no receipt in full was shown, that it appears that when the power of attorney was surrendered to appellant, there was a controversy between him and Guffin as to who should keep it, that the payment was made nearly eight months before final payment became due under the terms of the contract, and that no other payments on the contract were shown. We think it a reasonable inference from the evidence that no other payments were made, and since the trial court has so found, we will not disturb its finding.

Appellant also urges that the fact that the claim was not included by the executrix in the inventory of her

4. decedent's estate is a strong circumstance against her. However, if this fact had any probative force,

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it at most would show only that she had no knowledge of the claim at the time the inventory was made, and could in no manner conclude her, but possibly might affect the weight of her evidence.

The court's decision was not contrary to law, and was sustained by sufficient evidence, and the conclusions of law were not erroneous on the facts found.

Judgment affirmed.

NOTE.—Reported in 104 N. E. 519. As to power coupled with an interest, see 110 Am. St. 860. See, also, under (1) 4 Cyc. 62; (3) 30 Cyc. 1290; (4) 18 Cyc. 202.

KELLEY ET AL. v. SCANLAN ET AL.

[No. 8,240. Filed March 11, 1914.]

1. APPEAL.—*Assignment of Errors.—Ruling on Demurrer.—Joint Assignment.*—Where there were several defendants to an action, any one of whom might have filed a demurrer, an assignment of error on appeal that "the court erred in overruling the demurrer to the amended complaint," presents no question. p. 613.
2. APPEAL.—*Record.—Construction.—Assignment of Errors.*—On appeal by several defendants, where the record as originally filed showed that to the amended complaint the defendants filed "their several demurrers which said several demurrers are respectively in these words: (not on file)," and the overruling of the demurrers to which "defendants severally except," and by a return to a writ of *certiorari* it appears that defendants filed their "several demurrer," which is set out, but no ruling is shown, the court can not determine whether one or more than one demurrer was filed, and hence no question is presented by an assignment that "the court erred in overruling the demurrer to the amended complaint." p. 613.
3. APPEAL.—*Assignment of Errors.—Sufficiency.—Joint Assignment.*—A joint assignment of error in overruling a demurrer is insufficient to present any question, where the demurrer or demurrers, and the exceptions to the rulings thereon, were separate and several as to each appellant. p. 614.
4. APPEAL.—*Assignment of Errors.—Overruling Motion for New Trial.—Joint Assignment.*—The overruling of a motion for new trial, where such motion was separate and several as to the

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parties, and they separately and severally excepted to the ruling, can not be presented by a joint assignment of error. p. 614.

From Lake Superior Court; *Johannes Kopelke*, Judge.

Action by James P. Scanlan against John M. Kelley and others, in which the Condit-McGinnity Realty Company and another were made garnishee defendants. From a judgment for plaintiff, the principal defendants appeal. *Affirmed*.

Houren, Sefton & Renollet and *Milo M. Bruce*, for appellants.

MacCracken & Freer, for appellees.

HOTTEL, J.—This is an action begun by appellee James P. Scanlan to recover a commission alleged to be due him as broker in the sale of certain real estate. The appellees Condit-McGinnity Realty Company and Gary State Bank were made garnishee defendants. A trial by the court resulted in a finding and judgment against the appellants in favor of appellee Scanlan and, an order on the garnishee defendant bank to pay over to said Scanlan the sum of \$850 of the money in its hands belonging to said appellants, and an order dismissing the action as to the garnishee defendant realty company.

From this judgment appellants appeal and in their original assignment of error questioned the ruling on their motion for a new trial alone. They afterwards asked and were granted a writ of *certiorari* and leave to amend their assignment of error. This amended assignment of error, omitting the caption, is as follows: "The appellants say there is manifest error in the judgment and proceedings in this cause for each of the following reasons: (1) The amended complaint does not state facts sufficient to constitute a cause of action. (2) The court erred in overruling the demurrer to the amended complaint. (3) The court erred in overruling the motion for a new trial."

We do not deem it necessary to set out the amended complaint. It is clearly sufficient we think to withstand an at-

tack, first made in this court, such as is presented by the first error assigned. *Hubbard v. Reily* (1912), 51 Ind. App. 19, 98 N. E. 886, and authorities cited.

The second error assigned presents no question for either of two reasons: (1) There were several defendants to the complaint. They may have each filed a separate

1. demurrer to the complaint based on any one or more of the different grounds of demurrer provided by the statute, or any two or more of such defendants may have filed a joint demurrer based on either, or all of such grounds, and hence any ruling on such several demurrers would necessarily present entirely different and distinct questions. The assignment here relied on does not indicate whose demurrer, or in any other way specify or identify the particular demurrer to which the ruling assigned as error is intended to refer, and hence, under §696 Burns 1908, §655 R. S. 1881, and Rule 4 of this court, is not sufficiently specific to present any question for review. *Walter A. Wood, etc., Mfg. Co. v. Angemeier* (1912), 51 Ind. App. 258, 99 N. E. 500, and authorities there cited; *State, ex rel. v. Lung* (1907), 168 Ind. 553, 557, 558, 80 N. E. 541; *J. Painter & Sons v. W. H. Metz Co.* (1893), 7 Ind. App. 652, 654, 35 N. E. 27; *Baldwin v. Sutton* (1897), 148 Ind. 591, 593, 47 N. E.

629, 1067. (2) The record as originally filed shows

2. that after the service of the writ of attachment on each of the garnishee defendants appellee Scanlan filed an amended complaint to which the appellants, naming them, filed "their several *demurrers* which said several *demurrers* are respectively in these words: (Not on file)"; that "the *demurrers* of the defendants John M. Kelley, Minnie Kelley and Washington L. Albee are now overruled to which ruling of the court said defendants *severally* except." By a return to the writ of *certiorari* granted herein it appears that appellants, naming them, filed "their *several demurrers* to the plaintiff's amended complaint which said *demurrer* is in these words: The defendants John M. Kel-

ley, Minnie Kelley and Washington L. Albee *each demur* to plaintiff's amended complaint, and, for cause of *demurrer* say that said amended complaint does not contain facts sufficient to constitute a cause of action." The return to the *certiorari* shows no ruling on such demurrer therein set out. The record as originally filed would indicate that each of the appellants filed a separate demurrer making three in number, each of which may have been for different causes, and each of which was overruled by the court. The writ of *certiorari* would indicate that the appellants filed one several demurrer in which case the demurrer though several or separate as to each appellant would necessarily be for the same cause. As the record comes to us, we cannot

3. know whether one or more than one demurrer was filed; and hence under the authorities, *supra*, no question is presented by such assignment; but, in any event, it affirmatively appears both from the record as originally filed and from the return to the writ of *certiorari* that the demurrer or demurrers, whether one or more, and the exceptions to the rulings thereon were separate and several as to each appellant, and hence no question is presented by the assignment of error which is joint as to all the appellants. *Fowler v. Newsom* (1910), 174 Ind. 104, 114, 90 N. E. 9; *Doty v. Patterson* (1900), 155 Ind. 60, 61, 56 N. E. 668; *Green v. Heaston* (1900), 154 Ind. 127, 130, 56 N. E. 87; *Morey v. Terre Haute, etc., Light Co.* (1911), 47 Ind.

4. App. 16, 29, 93 N. E. 710, and authorities there cited.

For the same reasons no question is presented by appellants' third assigned error.

No available error being presented by the record, the judgment below is affirmed.

NOTE.—Reported in 104 N. E. 516. See, also, under (1, 3, 4) 2 Cyc. 1003; (2) 2 Cyc. 1002.

RAHKE v. McNULTY.

[No. 8,281. Filed March 11, 1914.]

1. **APPEAL.—Questions Reviewable.—Briefs.**—No question is presented on alleged error in sustaining a demurrer to a paragraph of set-off, where neither the demurrer nor the substance is set out in appellant's brief. p. 616.
2. **APPEAL.—Presentation of Questions Below.—Instructions.**—All questions upon alleged errors of the trial court in the giving or refusal of instructions must be presented by motion for a new trial. p. 616.
3. **APPEAL.—Questions Reviewable.—Briefs.**—Where neither the motion for a new trial, nor its substance, appears in appellant's brief, error can not be predicated upon rulings of the trial court with respect to the giving or refusal of instructions, even if the questions are otherwise properly presented. p. 616.
4. **APPEAL.—Assignment of Errors.—Sufficiency.**—An assignment that "the court erred in giving instructions Nos. 4 and 5 and in refusing to give all of the instructions asked by appellant," presents no question. p. 616.
5. **APPEAL.—Questions Reviewable.—Overruling Motion for New Trial**—No question is presented on the overruling of a motion for new trial, where neither the motion nor the substance is set out in appellant's brief. p. 616.

From Superior Court of Marion County (83,409) ; *Charles J. Orbison*, Judge.

Action by August E. Rahke against Charles O. McNulty. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

William E. Reiley, for appellant.

Ernest T. Brown and *Frank T. Brown*, for appellee.

SHEA, P. J.—This was an action to recover money alleged to have been lost in gambling. Appellant states in his brief that he relies on the following errors in the proceedings for a reversal of the judgment of the court below: (1) The court erred "in sustaining appellee's demurrer to appellant's set-off." (2) The "court erred in not instructing

jury to find for appellant.” (3) The “court erred in giving instructions Nos. 4 and 5 and in refusing to give all of the instructions asked by appellant.” (4) The “court erred in overruling appellant’s motion for a new trial.”

No question is presented by the first point urged by appellant. Neither the demurrer to appellant’s set-off nor the substance thereof is set out in appellant’s brief.

1. Under numerous authorities, this question is not properly presented. *Pry v. Ramage* (1911), 176 Ind. 446, 447, 96 N. E. 385; *Knickerbocker Ice Co. v. Gray* (1905), 165 Ind. 140, 142, 72 N. E. 869, 6 Ann. Cas. 607; *State v. Lukins* (1909), 43 Ind. App. 341, 87 N. E. 246; *Citizens Nat. Bank v. Alexander* (1905), 34 Ind. App. 596, 73 N. E. 279.

The second and third points may be disposed of together. All questions upon alleged errors of the trial court in giving or refusing to give instructions must be presented by motion for a new trial. Neither the motion for a new trial nor the substance thereof appears in appellant’s brief. Therefore, no error of the trial court can be predicated upon the rulings with respect to the giving or refusing to give instructions, if the questions were otherwise properly presented, but there has also been a complete failure to set out the instructions to which objections are made. *Griffith v. Anderson Iron Mfg. Works* (1905), 36 Ind. App. 703. It may be further

4. suggested that an assignment that “The court erred in giving instructions Nos. 4 and 5 and in refusing to give all of the instructions asked by appellant” presents no question. Appellant’s fourth point presents no ques-

tion for the reason that neither the motion for a new trial nor the substance thereof is set out in appellant’s brief. *Bennett v. Root Furn. Co.* (1911), 176 Ind. 606, 608, 96 N. E. 708; *Dillon v. State* (1911), 48 Ind. App. 495, 96 N. E. 171; *Price v. Swartz* (1912), 49 Ind. App. 627, 97 N. E. 938.

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There is a complete failure in appellant's brief to comply with Rule 22 of this court. Judgment affirmed.

NOTE.—Reported in 104 N. E. 523. See, also, under (1) 2 Cyc. 1014; (2) 29 Cyc. 744; (3) 2 Cyc. 1013; (4) 2 Cyc. 992-995; (5) 3 Cyc. 176.

TAYLOR v. GRINER.

[No. 8,205. Filed March 12, 1914.]

1. **HUSBAND AND WIFE.—Suretyship of Wife.—Answer.—Sufficiency.**—In an action against a married woman on a note signed by her alone, and to foreclose the mortgage securing same, an answer alleging that she executed the note and mortgage as surety for her husband and received no consideration therefor, and that she was at the time and still is a married woman, was sufficient, although it would have been better pleading to have alleged that she received no part of the consideration for the note and that it did not inure to her benefit or the benefit of her estate. p. 619.
2. **PLEADINGS.—Admissions.—Facts Not Denied.**—Under §392 Burns 1908, §383 R. S. 1881, matters well pleaded in a complaint, and not controverted in the answer, must be taken as true in testing the sufficiency of the answer. p. 619.
3. **APPEAL.—Review.—Harmless Error.—Sustaining Demurrer to Answer.**—Error in sustaining a demurrer to a paragraph of answer is harmless, where all the evidence admissible thereunder was also admissible under another paragraph held good, and which averred the same facts more fully. p. 620.
4. **HUSBAND AND WIFE.—Suretyship of Wife.—Answer.—Proof.**—In an action against a married woman on a note and to foreclose a mortgage securing same, the allegation in her answer of suretyship, "that the entire consideration was used by her husband," was mere surplusage which imposed no additional burden in proving her defense, since the defense is made on proof of the suretyship and that she received no part of the consideration for which the note and mortgage were executed. p. 620.
5. **ESTOPPEL.—Equitable Estoppel.—Elements.**—The elements of an equitable estoppel are, misrepresentation of a material fact by the party sought to be estopped, made with knowledge of the facts with the intention that another, who was ignorant of the facts, should act thereon, and a reliance upon such representation by such other in the doing of some act to his injury, which he was thereby induced to do and which he would not have done except for such representation. p. 622.

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6. **ESTOPPEL.—*Estoppel by Conduct.***—Where a party sought to be estopped was careless in making statements about which he ought to have known the truth, he may in some cases be held to constructive knowledge of the facts, and if the other party was negligent or corrupt in not seeking the truth, he will be charged with knowledge thereof. p. 622.
7. **HUSBAND AND WIFE.—*Estoppel of Wife to Assert Suretyship.—Answer of Suretyship.—Reply.—Sufficiency.***—A married woman may be estopped from asserting suretyship in an action against her on a note, and where suretyship was pleaded, a paragraph of reply setting up all the elements of estoppel on the ground of misrepresentations by defendant in obtaining the money, except that there was no averment that the representations were made with knowledge of their falsity, was sufficient, where the allegations of the answer force the conclusion that such representations were false and made with knowledge of their falsity, and especially in view of the fact that the note sued on was signed by her alone, since in itself it constituted at least a *prima facie* representation that she signed as principal and that the debt was her debt. p. 622.
8. **HUSBAND AND WIFE.—*Suretyship of Wife.—Estoppel.—Evidence.***—In an action against a married woman on a note and mortgage, evidence that defendant's husband solicited plaintiff to lend his wife the money to improve her farm, that after some delay and efforts to obtain money from plaintiff, the note signed by the wife alone, and a mortgage signed by both husband and wife, together with a paper signed by the wife ordering the money to be paid to her husband for her benefit, were forwarded to plaintiff, that the plaintiff believed and relied on the statement that the money was to be paid to the husband for the sole use and benefit of the wife and would not have made the loan but for such statement, together with other evidence, and in the absence of evidence of any fact to put plaintiff on inquiry, was sufficient to warrant the finding that defendant was estopped from setting up the defense that she signed the note and mortgage as surety for her husband. p. 623.

From Brown Circuit Court; *William E. Deupree*, Judge.

Action by Jacob Griner against Rebecca J. Taylor and another. From a judgment for plaintiff, the defendant named appeals. *Affirmed.*

George W. Long, for appellant.

James M. Jones and *W. C. Duncan*, for appellee.

IBACH, J.—Action by appellee against appellant and her husband Charles Taylor, on a promissory note signed by her alone, payable to appellee, and to foreclose a mortgage executed by her and her husband on real estate which she owned. There were four paragraphs of answer to the complaint, the first a general denial, the other three setting up that appellant was a married woman when the note was executed, the wife of defendant Charles Taylor, that she signed the note and mortgage as surety for her husband, and received no part of the consideration. A demurrer to the second paragraph of answer was sustained, demurrers to the third and fourth were overruled. There were two paragraphs of reply, the first alleging facts showing appellant estopped to set up suretyship as a defense, the second a general denial. Demurrer to the first paragraph of reply was overruled. There was trial by the court, with special findings of fact. Judgment was rendered for the appellee for the amount of the note, interest and attorney fees, and the judgment was against both defendants for foreclosure of the mortgage.

It is first urged that the court erred in sustaining a demurrer to the second paragraph of answer, which is in the following words: “The defendant, Rebecca J. Tay-

1. lor, says: That she executed the note and mortgage sued on as the surety of the defendant, Charles Taylor, and received no consideration therefor. That at
2. the time she executed the same she was and still is a married woman.” A married woman’s contracts of suretyship are void. §7855 Burns 1908, §5119 R. S. 1881. Appellant relies upon the case of *McCarty v. Tarr* (1882), 83 Ind. 444, for the sufficiency of this answer. Appellee insists that the answer held good in that case differed from the present in that it was stated therein that the land mortgaged was her separate property. However, it appears from the complaint in this case that she was the owner of the property mortgaged. Matters well pleaded in a complaint not controverted in the answer must under §392 Burns 1908, §383 R.

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S. 1881, be taken as true in testing the sufficiency of the answer. *Armstrong v. Cavitt* (1881), 78 Ind. 476; *Matter v. Campbell* (1880), 71 Ind. 512; *Bowen v. Pollard* (1880), 71 Ind. 177; *McCarty v. Tarr*, *supra*. When considered together with the averments of the complaint, we believe the answer good, under the holding in *McCarty v. Tarr*, *supra*, and that the court erred in sustaining a demurrer thereto. It is better pleading to aver that she received no part of the consideration for which the note was given, and that it did not inure to her benefit or the benefit of her estate (*Field v. Noblett* [1900], 154 Ind. 357, 56 N. E. 841), but under the rule for construction of pleadings as announced in *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99, the averment that she received no consideration for the execution of the note and mortgage is sufficient.

However, we consider the error harmless, for all the evidence admissible under this paragraph of answer was also admissible under the allegations of the third para-

3. graph, which avers the same facts more fully, and also that the note and mortgage were executed in consideration of a loan by the plaintiff to defendant Charles Taylor, by him used for his individual use, no part of which was used to pay any of the individual debts of appellant, or any debts for which she was liable, that she was in no wise benefited by the note and mortgage, or the consideration thereof, either in person or estate, and that the entire consideration thereof was received by her codefendant.

4. Appellant urges that sustaining a demurrer to a good paragraph of answer is fatal if the paragraphs allowed to stand impose upon the pleader the burden of introducing more or different evidence than would have been necessary under the paragraph erroneously condemned, and cite *Field v. Noblett*, *supra*, and *Metzger v. Hubbard* (1899), 153 Ind. 189, 54 N. E. 761. The third paragraph contains in addition to the averments of the second, the allegation

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that the entire consideration was used by her husband. However, the presence of this allegation is mere surplusage and causes no increased burden upon appellant, for she has made out her defense when she has proved that she signed the note and mortgage as her husband's surety, and that she, in person or estate, received no part of the consideration for which the note and mortgage were given. Having done this, it adds nothing to prove that her husband used the entire consideration.

The second paragraph of reply is in the following words: "The plaintiff, Jacob Griner, for reply to the separate answer of Rebecca J. Taylor, alleges that at the time of the execution of the note and mortgage mentioned in this action, and before this plaintiff had paid the money over on the same, this defendant Rebecca J. Taylor, by her certain written statement, made a part hereof, marked exhibit A, which she caused to be delivered to this plaintiff in which she stated and represented to plaintiff that the money for which she had signed said note and mortgage, was for her own use and benefit, and for this plaintiff to pay said money to her husband, Charles Taylor, for her. That said plaintiff relying upon said statements and believing them to be true and having no way of finding out the truth of said statements, was induced thereby to and did pay said money to her husband, Charles Taylor, for her. Plaintiff avers that had he believed that said money was for the use of the said Charles Taylor, he would not have made said loan. Wherefore, plaintiff prays that this defendant, Rebecca J. Taylor, be estopped from asserting that she is surety, and for cost of this action and all other proper relief."

"Exhibit A. Nashville, Ind. Oct. 21, 1895.

I Rebecca J. Taylor, having this day signed a note, the amount of the same being two hundred dollars, payable twelve months after date, payable to Jacob Griner (Jr.) and also a mortgage to the said Jacob Griner to secure the payment of the above named note, described in mortgage — I Rebecca J. Taylor, further order the

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payment of the two hundred dollars to be paid to Charles Taylor, my husband, for my own use and benefit. Signed in the presence of this witness. Rebecca J. Taylor.”

It is urged that this reply is bad because it fails to show whether she signed the note and mortgage as principal or surety, or knew or understood in what capacity she signed it, whether as principal or surety, or that appellee made any efforts to ascertain in what capacity she signed.

The elements essential to make out an equitable estoppel as applied to cases of representations are, (1) misrepresentation of a material fact by the party sought to be es-

5. topped (2) made with knowledge of the facts (3) with the intention that another party shall act upon it, (4) who was ignorant of the truth, (5) relied upon such representations, and was induced thereby to act to his injury, (6) which he would not have done except for such representations. If the party sought to be estopped

6. was careless in making statements about which he ought to have known the truth, he may in some cases be held to constructive knowledge of the facts, and if the other party was negligent or corrupt in not seeking the truth, he is held not to be ignorant of the truth. *Wright v.*

Fox (1914), 56 Ind. App. —, 103 N. E. 442. The

7. present reply contains facts which show all the above elements, except the second. The answers to which it is addressed aver that she signed the note and mortgage as surety, and if these answers are true, her representations must have been false, and made with knowledge of their falsity. The note itself, signed by her alone, was at least a *prima facie* representation that she signed as principal, and that the debt was her debt. *Field v. Noblett, supra*, 359. A married woman may be estopped from setting up suretyship as a defense to her contracts. See cases cited above. We think the reply was good.

It is also assigned, under the motion for new trial, that

the evidence does not support the decision and that the decision is contrary to law. The evidence tending to

8. support the decision shows that Charles Taylor lived near Nashville, and appellee was an express wagon driver in Columbus, some twenty miles away. Taylor learned, probably from Joshua Durnald, driver of a mail hack between Nashville and Columbus, that appellee had some money to loan. Taylor came to Columbus to see appellee, and told him his wife wanted to borrow some money to improve her farm, and would give a mortgage on the farm to secure the loan. Appellee refused to loan the money until he knew that the loan was for her own use and benefit. Taylor made two or three trips to Columbus to see appellee, and at one time brought some papers, which for some reason, now forgotten by appellee, were unsatisfactory. Appellant herself did not see appellee. Finally, the note and mortgage sued on and the paper ordering the payment of the money to Charles Taylor for appellant's benefit, which had been prepared by a justice of the peace as an agent of the borrowers, were signed by appellant, and sent to appellee by the hack driver Durnald. Appellee delivered the money to Durnald, who delivered it to Taylor. Appellee believed the statement of appellant that the money was to be paid to her husband for her own use, relied upon it, and would not have made the loan but for this statement. Charles Taylor testified that part of the money was used to pay a debt of his, part to buy a wagon for him, and that his wife received no part of it. Appellant testified that she signed the papers, but did not read their contents, that her husband obtained the loan for himself, and that she received no part of it. Interest was paid on the note regularly up till about 1906. Affidavits by Charles Taylor to obtain mortgage exemptions from taxes, in which he swore that the mortgage on his wife's lands was her debt, were placed in evidence, and their tendency would be to impeach his testimony. The evidence, we believe, is sufficient for the court to find that appellee, under

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the circumstances, was not required to make any further investigation of the use to which the money was to be put, for there is no showing that investigation would have brought out any statement from appellant different from that made in writing. What use was to be made of the money was a fact peculiarly in the knowledge of herself, and she represented to appellee that it was for her own use. There appears nothing to put appellee on inquiry, nothing to indicate to him that the money was to be used for a purpose other than to improve appellant's farm, nothing to show that the transaction was not in good faith, if appellee's testimony is to be believed. Appellant's delivery of a written statement to appellee that the money was for her own use and benefit, at the same time with a note signed by her alone, would be some evidence that she had authorized the former acts of her husband in securing the loan ostensibly as her agent. Appellee stated that he believed her statement to be true, relied upon it, and would not have made the loan but for it. The testimony on the part of the contestants in many respects is conflicting, but we cannot weigh evidence, and we believe that the court was justified in finding from the evidence that appellant, in order to induce appellee to loan her money, represented to him that the money was to be appropriated to her own use, that appellee used due diligence under the circumstances, that he relied upon appellant's representations, believing them to be true, and would not have loaned the money but for them, and therefore, that appellant was estopped by her acts from setting up as a defense in the present action that she signed the note and mortgage as surety for her husband.

Judgment affirmed.

NOTE.—Reported in 104 N. E. 607. As to equitable estoppel, see 134 Am. St. 172. See, also, under (1) 21 Cyc. 1563, 1566; (2) 31 Cyc. 207; (3) 31 Cyc. 358; (4) 31 Cyc. 675; (5) 16 Cyc. 726; (6) 16 Cyc. 734, 738; (7) 21 Cyc. 1345, 1566; (8) 21 Cyc. 1346.

**AMERICAN SEEDING MACHINE COMPANY ET AL v.
BAKER ET AL.**

[No. 8,777. Filed March 12, 1914.]

1. **ACCORD AND SATISFACTION.—Part Payment.**—Generally, the payment of less than the full amount of a past due and liquidated claim under an agreement to accept such amount in full payment of the debt only operates as a discharge of the debt *pro tanto*, in the absence of some other consideration. p. 627.
2. **ACCORD AND SATISFACTION.—Part Payment.—Check.**—A negotiable security for a smaller amount given and accepted in satisfaction of a larger debt will operate effectually in discharge of it; hence a bank check, being of the same negotiable character as an inland bill of exchange, when given and accepted in a less amount as payment of a liquidated claim, will operate as a discharge of the debt in full. p. 627.

From Wabash Circuit Court; *A. H. Plummer*, Judge.

Action by Alvin H. Baker and another against the American Seeding Machine Company and another. From a judgment for plaintiffs, the defendants appeal. *Affirmed.*

D. F. Brooks, for appellants.

Fred I. King and *W. H. Adams*, for appellees.

FELT, J.—Suit by appellees to enjoin the levying of an execution issued on a judgment against them in favor of appellant, American Seeding Machine Company. A demurrer to the complaint for want of facts was overruled. Appellants “failing and refusing to plead further”, judgment was rendered for appellees on their complaint in substance as follows: that the judgment recovered by the company against plaintiffs has been long since fully paid and discharged; that defendants be and they are “hereby restrained and enjoined from collecting or attempting to collect said judgment.”

It appears from the amended complaint that on April —, 1907, appellant company recovered a judgment against the appellees in the circuit court of Wabash County, Indiana,

for the sum of \$160.44, which is duly entered of record, “and thereon appears to be wholly unpaid, unsatisfied and unappealed from and appears to be a valid and subsisting judgment; that on the 23rd day of May, 1911, execution was issued thereon and delivered to” appellant, Freeman, sheriff of Wabash County and was by him levied upon the property of plaintiffs, situated in that county; that defendants are threatening to and will advertise plaintiffs’ property and will sell the same unless enjoined from so doing; that the judgment was rendered against plaintiffs by default; that at different times after the judgment was rendered, executions thereon were issued and delivered to the sheriff; that at said times plaintiffs were indebted to divers persons, in various amounts and were insolvent and unable to pay their indebtedness in full; that about June 13, 1907, plaintiffs entered into negotiations with defendant company for settlement of said judgment; that the company was informed of plaintiff’s financial condition and knew they were unable to pay their debts; that as a result of the negotiations, the company, in consideration of the agreement of plaintiffs to pay the costs of the suit and the agreement of appellee, Alvin H. Baker, to execute a check to the company for the sum of \$34.06, in addition to the amount of the costs, agreed to cancel and satisfy the judgment in full and therefor accepted a check executed by appellee, A. H. Baker, in the sum of \$40.86, dated June 13, 1907, and drawn on the Wabash National Bank of Wabash, Indiana, which check bore on the face thereof the words “In full payment of the American Seeding Company”; that the company accepted the check in full payment of said judgment and in lieu of said judgment, and in full and complete satisfaction thereof and by its attorneys executed to plaintiffs a receipt in full payment and satisfaction of said judgment and costs and paid the costs in full; that in consideration of the execution of the check the company agreed to satisfy the judgment of

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record; that since June 13, 1907, nothing has been due the company on the judgment. Prayer for a temporary restraining order and for a permanent injunction.

The only error assigned is the ruling on the demurrer. On behalf of appellants, it is contended that payment of

less than the full amount of a past due and liquidated

1. claim, under an agreement to accept such amount in full payment of the debt, only operates as a discharge of the debt, *pro tanto*, and will not operate as a dis-

2. charge of the debt in full, in the absence of some other consideration to support the agreement to ac-

cept less than the full amount of the debt. Appellee concedes the general rule, but contends that the case at bar falls within one of the numerous exceptions to the rule; that one of the exceptions is the giving and acceptance of a negotiable instrument for an amount less than the debt under an agreement that it shall satisfy the debt in full. In the case of *Wells v. Morrison* (1883), 91 Ind. 51, 62, the court considered such payment by a check identical in form with the one here under consideration, and said: "Such a check must be viewed as an inland bill of exchange. *Glenn v. Noble* [1820], 1 Blackf. 104. In its quality of negotiability under the law merchant, it exactly resembles a bill of exchange. Byles, Bills 13; Chitty, Bills (10th Am. ed.) 511. It is one of the exceptions to the general rule laid down by the court in its instruction No. 5, that where the less sum is paid by a check, or other instrument negotiable by the law merchant, it may operate as a discharge of the entire indebtedness. * * * 'A negotiable security for a smaller amount given and accepted in satisfaction of a larger debt will operate effectually in discharge of it.' " In *Little v. Koerner* (1902), 28 Ind. App. 625, 627, 63 N. E. 766, this court said: "The general rule is that payment of a part of a debt is not a satisfaction of the full amount, though the creditor agrees to receive a part in satisfaction of the whole. 2 Parsons, Contracts 618, 619. To this rule there are excep-

tions, viz., where the claim is unliquidated or unadjusted; where payment is made before it is due; where new security is given; where there is a composition with creditors. A negotiable security for a smaller amount given and accepted in satisfaction of a larger debt will operate effectually in discharge of it.”

The exception to the general rule, where a negotiable instrument is given and accepted as payment of a liquidated claim, is recognized in other decisions of our courts. *Fensler v. Prather* (1873), 43 Ind. 119, 122; *Fletcher v. Wurgler* (1884), 97 Ind. 223, 226; *Wipperman v. Hardy* (1897), 17 Ind. App. 142, 150, 46 N. E. 537; *Hodges v. Truax* (1898), 19 Ind. App. 651, 656, 49 N. E. 1079; *Pottlitzer v. Wesson* (1893), 8 Ind. App. 472, 35 N. E. 1030. The last two cases cited are among those relied upon by appellants. On the facts of those cases, they seem to have been correctly decided, but some expressions therein made, seem to support appellants' contention. This is especially true of *Hodges v. Truax, supra*. In that case the ruling on the demurrer to the third paragraph is considered and determined under the general rule above stated but it does not appear from the opinion that the court in doing so considered the effect of the giving and acceptance of a regular bank check in payment of the amount alleged to have been agreed upon and paid in satisfaction of a note for a larger amount. The court said: “Appellant did not say to appellee when he sent the check, to return if not accepted in full * * * . It is plain from the findings that appellee did not accept the amount of the check in full payment, for it sent appellant a receipt for the amount without showing upon what account, or under what conditions it was paid.” What the court decides is that the facts of that case bring it within the general rule. The court, however, recognizes the fact that under different circumstances, showing an accord and satisfaction, an agreement to accept a negotiable instrument in payment, though for a sum less than the full amount, would be binding upon the

parties after the acceptance of such instrument. In *Fletcher v. Wurgler*, *supra*, the court in speaking of the rule that where a liquidated debt is due, the receipt of a sum less than the whole amount, on an agreement that the sum received shall operate as a discharge of the whole debt, is not a good accord and satisfaction, said: "The ground upon which this rule of law, which is not particularly favored by the courts, rests, is that such an agreement is without consideration."

Some states have abrogated the rule by statute, and in some jurisdictions the courts have held that where the contract was fairly made and executed, payment of less than the full amount under an agreement that it shall satisfy the whole debt, will be upheld on the ground that where a party voluntarily surrenders his whole claim, on payment of a part and gets all he bargains for, the settlement will be upheld as a good accord and satisfaction. In most of the other states the courts have recognized and enforced numerous exceptions to the general rule, thereby greatly limiting its application, though still recognizing the rule. As showing the view of the question generally taken by the courts and giving its history, we cite the following: *Clayton v. Clark* (1896), 74 Miss. 499, 21 South. 565, 22 South. 189, 37 L. R. A. 771, 60 Am. St. 521; *Dreyfus v. Roberts* (1905), 75 Ark. 354, 87 S. W. 641, 69 L. R. A. 823, 112 Am. St. 67, 5 Ann. Cas. 521; *Frye v. Hubbell* (1907), 74 N. H. 358, 68 Atl. 325, 17 L. R. A. (N. S.) 1197; *Melroy v. Kemmerrer* (1907), 11 L. R. A. (N. S.) 1018, notes; *Haydock Carriage Co. v. Zeigler* (1908), 21 L. R. A. (N. S.) 1005, notes; *Fuller v. Kemp* (1819), 138 N. Y. 231, 20 L. R. A. 785, notes.

The court did not err in overruling the demurrer to the complaint.

Judgment affirmed.

NOTE.—Reported in 104 N. E. 524. As to accord and satisfaction, see 100 Am. St. 420. On the question of accord and satisfaction by part payment, see 20 L. R. A. 785; 6 L. Ed. U. S. 159; 9 L. Ed. U. S. 1047; 10 L. Ed. U. S. 1046; 26 L. Ed. U. S. 1186. As to accept-

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ance of remittance of part of the amount of an unliquidated or disputed claim, accompanied with the statement that it is "in full," or words of similar import, as assent to its receipt in full payment, see 14 L. R. A. (N. S.) 443; 27 L. R. A. (N. S.) 439. See, also, under (1) 1 Cyc. 320; (2) 1 Cyc. 328.

GREENLEE v. NEWTON SCHOOL TOWNSHIP OF JASPER COUNTY.

[No. 8,232. Filed March 17, 1914.]

1. SCHOOLS AND SCHOOL DISTRICTS.—*Abandonment.—Grounds for Abandonment.—Recovery for Transportation of Pupils.*—Although the unfavorable condition of roads, streams and bridges would probably be ground for enjoining the abandonment of a school under §6422 Burns 1908, Acts 1907 p. 444, where a school has been abandoned and the pupils have been transported to another school, proof that such conditions permitted abandonment is not essential to a recovery for the furnishing of such transportation. p. 631.
2. SCHOOLS AND SCHOOL DISTRICTS.—*Abandonment.—Transfer of Pupils.*—On the abandonment of a school under §6422 Burns 1908, Acts 1907 p. 444, there can be no transfer of the pupils in the sense contemplated by §6449 Burns 1908, Acts 1901 p. 448, and while the children from such abandoned school may become attached to another district by being enumerated therein, §6447 Burns 1908, Acts 1895 p. 127, relating to enumeration, does not make enumeration essential to attach children to a school district, but it is the apparent intention of that section that residence and not enumeration fixes the attachment. p. 632.
3. SCHOOLS AND SCHOOL DISTRICTS.—*Action for Cost of Transporting Pupils.—Complaint.*—A complaint against a school township for the cost of transporting plaintiff's children, alleging "that the conveyance used for said transportation was a top buggy, closed with side curtains, and drawn by a horse owned and kept by this plaintiff," shows a sufficient compliance with §6423 Burns 1908, Acts 1907 p. 444, providing that "such transportation shall be in a comfortable and safe conveyance," etc. p. 633.
4. SCHOOLS AND SCHOOL DISTRICTS.—*Action for Cost of Transporting Pupils.—Complaint.—Allegation as to Appropriation.*—In an action to recover for transporting school children, allegations of the complaint showing that the township advisory board, at each of its annual meetings covering the period during which such transportation was had, appropriated the sum of \$500 for such

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purpose, were sufficient without pleading the record of the advisory board, or alleging that such appropriation had not been expended, since it is never necessary to plead the evidence, and the entire expenditure of the appropriation, if a fact, is a matter of defense. p. 634.

5. SCHOOLS AND SCHOOL DISTRICTS.—*Transportation of Pupils.—Contract.—Necessity for Writing.*—Section 9598 Burns 1908, Acts 1899 p. 150, requiring certain contracts by school trustees to be in writing, does not apply to contracts for the transportation of pupils from abandoned schools under §6422 Burns 1908, Acts 1907 p. 444. p. 635.

6. SCHOOLS AND SCHOOL DISTRICTS.—*Contracts.—Transportation of Pupils.*—The rule that a township trustee can not contract to pay a reasonable compensation for services to be rendered to the township, has no application to an executed contract, so that although no definite price for the transportation of school children pursuant to §6422 Burns 1908, Acts 1907 p. 444, had been agreed upon, where the contract had been fully executed, a recovery of the reasonable value of such service could be had. p. 635.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Action by Everett Greenlee against Newton School Township of Jasper County. From a judgment for defendant, the plaintiff appeals. *Reversed.*

John A. Dunlap, for appellant.

George A. Williams, for appellee.

IBACH, J.—Action by appellant against appellee on a contract entered into between him and Edward P. Lane, trustee of appellee, for transportation of appellant's children to school. The court sustained appellee's demurrer to appellant's complaint, and the latter refusing to plead further, rendered judgment for appellee. Error is assigned in sustaining the demurrer to the complaint.

We shall set out only such portions of the complaint as were challenged by the assignments in the memorandum attached to the demurrer. It is averred "that prior to

1. the beginning of said 1909 school year the school formerly maintained in said school district No. 1 was abandoned by the township trustee for the reason that there

were less than twelve regular pupils attendant at said school during the prior year, and that said school remained abandoned during said 1909 and 1910 school years, and no school was maintained and no teacher was teaching in said district during that time.” It is urged that these facts do not show an abandonment of the school in conformity with law, under the provisions of §6422 Burns 1908, Acts 1907 p. 444, since it is not alleged that the condition of roads, streams and bridges permitted such abandonment. It is probable that the unfavorable condition of roads, streams and bridges would be a ground for injunction to prevent the abandonment of a school, but after it has been abandoned, and the children from the abandoned district have been transported to another school, it is not necessary in an action to recover for furnishing such transportation, to prove that these conditions permitted abandonment.

The complaint alleges that “during the greater part of the school year beginning September, 1909, and during all the school year beginning September, 1910, plaintiff has

2. resided together with his family within said school district No. 1, and was a member of said school district,” and that his two children aged 10 and 7 years were during all of that time under the care and custody of appellant and his wife. Appellee contends that this does not show that the children ever belonged to school district No. 1, or were ever enumerated in said district, and also urges that the averment “that the children attached for school purposes to said school district No. 1 and all pupils residing within said district who had moved into the district after said school was so abandoned were by reason of said abandonment transferred to other school districts; that plaintiff’s said children were as a result of said abandonment transferred to said school district No. 4,” does not state facts showing the transfer of the children from school district No. 1 to school district No. 4. It was said in *Patterson v. Middle School Tp.* (1912), 50 Ind. App. 460, 98 N. E. 440: “There

could be no 'transfer' as contemplated by §6449 Burns 1908, Acts 1901 p. 448, from a school district which has ceased to exist. A school district is not a geographical subdivision of a township, with definite and certain boundaries. It exists as an entity by virtue of the school. When the school is abandoned, the children of school age * * * become attached to another district by being enumerated therein." Where the parent of children in his custody moves into a certain community after the time for the school enumeration of a certain year, it is not necessary that his children be enumerated in order to have the benefits of the schools of the district for that year; it is sufficient if such children be assigned to the particular school. See *Willan v. Richardson* (1912), 51 Ind. App. 102, 98 N. E. 1094. Our statute (§6447 Burns 1908, Acts 1895 p. 127), does not provide that enumeration is necessary to attach children to a school district, only that the enumerator shall give the number of the school district to which the person having the custody of a child or children is attached for school purposes, and shall designate the congressional township in which such person resides. The apparent intent of the statute is that the residence fixes the attachment, and not the enumeration.

Next it is urged that the allegations that the appellant furnished transportation for his children, "that the conveyance used for said transportation was a top buggy, 3. closed with side curtains, and drawn by a horse owned and kept by this plaintiff," does not show a compliance with §6423 Burns 1908, Acts 1907 p. 444, which provides that "Such transportation shall be in comfortable and safe conveyances. The drivers of such conveyances shall furnish the teams therefor, and shall use every care for the safety of the children under their charge, and shall maintain discipline in such conveyance." We think there is no merit in this contention.

It is also objected that the complaint does not state facts showing an appropriation by the advisory board of Newton

Township creating a fund which appellee could use to

4. transport the children, but states only a legal conclusion that an appropriation was made. The language of the complaint in this respect as to the year 1910 is: "Plaintiff further avers that at the annual meeting of the advisory board of Newton Township, held on the second Tuesday in September, 1910, the said Edward P. Lane trustee, presented to said board an estimate of the amount of money required to defray the expense of furnishing transportation for all of the pupils in said township entitled thereto, by reason of the abandonment of schools, to and from the schools to which they had been transferred, and said advisory board appropriated the sum of \$500 for said purpose and authorized the said Edward P. Lane trustee, to expend the same or so much thereof as might be found necessary to defray the expense of furnishing transportation for said pupils as above set out. That during said 1910 school year there were in said Newton Township ten pupils who had been transferred to other school districts by reason of the abandonment of the schools in the district to which they were attached for school purposes, and who were entitled to transportation to be furnished by the township trustee, by reason of their age and the distance from the schools to which they were so transferred. That all of said children lived in district No. 1 and district No. — and could have been hauled to and from school in two separate conveyances at an expense of not to exceed \$1.50 per day for each conveyance, and that there were 140 school days in said 1910 school year in said township." A precisely similar averment as to the years 1909 and 1908 is found. These allegations are sufficient, and it is not necessary to plead the record of the advisory board, as appellee insists. It is never necessary to plead the evidence. Appellant has shown an appropriation by the advisory board for the purpose of transporting children from abandoned schools, sufficient to transport all such children in the township. It may be that if these appro-

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priations had been entirely expended, appellant could not recover, but that would be a matter of defense. See *Lincoln School Tp. v. Union Trust Co.* (1905), 36 Ind. App. 113, 73 N. E. 623, 74 N. E. 272; *Waters v. State, ex rel.* (1909), 172 Ind. 251, 88 N. E. 67.

The contention is made that under §9598 Burns 1908, Acts 1899 p. 150, the contract in the present case must have been written, in order to support a recovery. It was
5. held in *Patterson v. Middle School Tp., supra*, that §9598, *supra*, does not apply to contracts for the transportation of children from abandoned schools under §6422, *supra*.

Lastly, it is said that the complaint seeks to recover upon an alleged oral agreement to pay appellant a reasonable compensation for the alleged transportation, and the
6. law does not permit the township trustee to make a contract to pay a reasonable compensation to a person for services rendered for the corporation which he represents, and that the complaint discloses upon its face that there was never any agreement as to the amount of compensation. Appellee cites the cases of *Atkins v. Van Buren School Tp.* (1881), 77 Ind. 447; *Fairplay School Tp. v. O'Neill* (1891), 127 Ind. 95, 26 N. E. 686; *Jackson School Tp. v. Grimes* (1900), 24 Ind. App. 331, 56 N. E. 724; and *Taylor v. School Town of Petersburg* (1904), 33 Ind. App. 675, 72 N. E. 159, as supporting this position. In these cases recovery was sought for the breach of an executory contract. A different rule ordinarily applies where the contract is executed, and the party who has obtained the benefit and allowed the other party to perform can not escape by saying that no fixed compensation was agreed upon. It appears here that the advisory board authorized the expenditure of a sum sufficient to provide for the hauling of all the children entitled thereto under §6422, *supra*, that the trustee had agreed to pay Greenlee what the service was reasonably worth for the transporting of his children, and that in com-

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pliance with such agreement, Greenlee had transported them. Such being the case we think the township liable for the reasonable value of the services rendered.

Judgment reversed, with directions to overrule appellee's demurrer to appellant's complaint.

NOTE.—Reported in 104 N. E. 610. As to the validity and construction of a statute, ordinance, etc., providing for the transportation of pupils to and from school, see Ann. Cas. 1912 C 762. See, also, under (1) 35 Cyc. 1061; (2) 35 Cyc. 1112, 1114, 1115; (3) 35 Cyc. 1058; (4) 35 Cyc. 1060; (5) 35 Cyc. 957; (6) 35 Cyc. 963, 964.

PIERSON v. DONHAM.

[No. 8,268. Filed March 17, 1914.]

1. **WORK AND LABOR.—Action on Quantum Meruit.—Complaint.—Commission Contracts.—Statutes.**—A complaint alleging that defendant employed plaintiff to obtain an option of purchase on certain real estate, that plaintiff performed the services, that defendant approved the arrangements and contracts made by plaintiff in his behalf under such employment and approved the price agreed upon, and that plaintiff's services were reasonably worth a certain per centum on the amount of the purchase price, is sufficient as a common count on the *quantum meruit*, and is not in any way controlled by §7463 Burns 1908, Acts 1901 p. 104, requiring contracts for commissions for the sale of real estate to be in writing. p. 637.

From Clay Circuit Court; *John M. Rawley*, Judge.

Action by Thomas F. Donham against Charles D. Pierson. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Charles D. Hunt and *Gilbert W. Gambill*, for appellant.

George A. Scott and *G. S. Payne*, for appellee.

FELT, J.—This is a suit by appellee against appellant to recover the value of certain services alleged to have been rendered. From a judgment in appellee's favor for \$100, appellant has appealed and assigned as the only error relied

on for reversal, that the court erred in overruling the demurrer to the complaint. The complaint is in one paragraph and in substance states that in 1909, appellant employed appellee to find, locate and obtain an option of purchase of certain land in the city of Terre Haute, to be used as a lumber yard; that he accepted the employment and performed the services; that the price of the real estate was \$13,500; that defendant approved the arrangements and contracts made by appellee in his behalf in pursuance of the employment and approved the price agreed upon for the property; that his services were reasonably worth five per cent of the amount of the purchase price of the property, and the same is due and unpaid. Prayer for judgment against appellant for \$675.

Appellant contends that the complaint is bad because it does not show that the contract for the real estate was in writing and cites §7463 Burns 1908, Acts 1901 p. 104,

1. in support of the contention. It is also claimed that the complaint attempts to plead a special contract and fails to aver any definite arrangements to pay anything for the alleged services; that there can be no recovery on the *quantum meruit* because it is an attempt to plead a special contract. The statute relied on provides in substance that no contract for a commission for the sale of the real estate shall be valid unless the same shall be in writing signed by the owner of such real estate or by his duly appointed agent. If appellee were seeking to enforce a commission contract against the owner for the sale of the real estate mentioned in the complaint, the statute would be applicable. But the complaint is not against the owner of the real estate, nor does it count on an enforcement of a commission contract against the appellant for the sale of real estate. The complaint alleges in substance an employment to render certain services and charges that the services were rendered by the appellee and sanctioned and approved by the appellant.

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The complaint is good as a common count, on the *quantum meruit*, for the services rendered in pursuance of the employment.

The objections, other than those relating to the statute, are equally untenable, as clearly appears from a reading of the complaint and the decisions of our courts. *Doney v. Laughlin* (1912), 50 Ind. App. 38, 44, 94 N. E. 1027; *Palmer v. Miller* (1898), 19 Ind. App. 624, 626, 49 N. E. 975; *Cox v. Peltier* (1902), 159 Ind. 355, 356, 65 N. E. 6; *Jenney Electric Co. v. Branham* (1896), 145 Ind. 314, 324, 41 N. E. 448.

There was no error in overruling the demurrer to the complaint. Judgment affirmed.

NOTE.—Reported in 104 N. E. 606. As to what entitles a broker to a commission, see 28 Am. St. 546. As to the necessity that agent's authority to purchase or sell real property be in writing to enable him to recover compensation for his services, see 44 L. R. A. 601; 9 L. R. A. (N. S.) 933. As to right of a real estate broker to recover commissions under an oral contract of employment where a statute requires a written contract, see 13 Ann. Cas. 977. See also 40 Cyc. 2839.

SARRLS v. BECKMAN.

[No. 8,274. Filed March 17, 1914.]

1. COVENANTS.—*Breach of Warranty.—Notice.—Necessity.*—However desirable it may be that written notice should be given of the breach of a covenant of warranty, there is no necessity therefor as a condition precedent to recovery on the warranty, where the warrantor knew of the defect in the title and that the title was being assailed, and refused to assist in protecting the grantee. p. 641.
2. COVENANTS.—*Warranty.—Breach.—Eviction.*—While the grantee in possession under a warranty deed, until evicted, can recover only nominal damages from his grantor because of a defect in the title, a grantee, who, while in possession, on being subjected to trouble because of a defect in his title, brought an action to have his title quieted in which judgment was recovered against him in a large amount, could recover actual damages from the

grantor, since the judgment against him amounted to an eviction. pp. 641, 643.

3. COVENANTS.—*Warranties.—Breach.*—A recovery for breach of a covenant of warranty cannot be defeated on the ground that if grantee had remained silent the defect in the title would not have been discovered and the persons profiting by the defect would eventually have been barred by the statute of limitations, since a party cannot be required to hold property for the full period of limitation before he attempts to dispose of it or to perfect his title. p. 642.
4. TENANCY IN COMMON.—*Adverse Possession.—Ouster.*—A tenant in common can not acquire title by adverse possession against another tenant in common, unless there has been a constructive or actual ouster, as the possession of one is the possession of all. p. 643.

From Posey Circuit Court; *Herdis F. Clements*, Judge.

Action by John G. Beckman against Richard Sarrls. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

William Espenschied and *George Wm. Curtis*, for appellant.

G. V. Menzies, for appellee.

SHEA, P. J.—This was an action brought by appellee against appellant to recover damages for a breach of warranty in a certain warranty deed executed by appellant as a remote grantor. The complaint in one paragraph alleges substantially the following: Appellant Sarrls on July 4, 1894, conveyed certain real estate in Posey County, Indiana, containing 178 acres, for a consideration of \$4,000 by warranty deed to David Harper, who, on August 12, 1899, by warranty deed conveyed the same in fee simple to appellee. One James W. Whitworth was the remote grantor of appellant and appellee, and their common source of title to the real estate. At the time Whitworth conveyed the real estate, he was a married man, and his wife, Elizabeth Whitworth, did not join in the deed. On October 29, 1898, Whitworth died intestate, leaving surviving him his wife, who became the owner in fee simple of an undivided one-third interest

in the real estate in question. On March 18, 1901, Elizabeth Whitworth died intestate, seized in fee simple of the undivided one-third interest, and left certain named persons as her sole and only heirs surviving, who, after her death, asserted their claim to an undivided one-third of the real estate, and threatened to institute proceedings to evict appellee therefrom. At the time of the threatened proceedings, appellee had negotiated an advantageous sale of the real estate, but was hindered in consummating same by the claims of the heirs. Appellee thereupon brought suit to quiet his title to said one-third, and served appellant with notice in writing of the institution of the suit. The heirs by cross-complaint asserted their title to the undivided one-third. Judgment was rendered against appellee in favor of said heirs who were adjudged the owners of the undivided one-third thereof, thereby evicting appellee from same. Appellee expended the sum of \$300 for attorney fees in the suit to quiet title and demands judgment for \$2,000. The warranty deed from appellant to David Harper is made a part of the complaint by exhibit.

Appellant answered in five paragraphs, the first a general denial. The others aver want of notice, and charge that no person had asserted claim of title to the property until suit to quiet title was filed by appellee, thus apprising the owners of the one-third of the real estate of their interest therein, and for that reason appellant should be relieved of the liability charged in the complaint. As no questions are raised upon the pleadings we need not set out the answers in detail. The issues were tried by the court. Finding and judgment for appellee.

It is assigned that the court erred in overruling appellant's motion for a new trial. But two questions are urged in support of this contention: (1) "The decision and finding of the court is not sustained by sufficient evidence." (2) "The decision and finding of the court is contrary to law."

It is very urgently insisted on behalf of appellant that

the notice required to be given him should have been in writing. It is not urged that appellant did not have ac-

1. tual notice of the defect in the title which he attempted to convey to appellee. He was in attendance at the trial as a witness at the time judgment was rendered against appellee in favor of the Whitworth heirs. He had talked repeatedly with appellee and his agent with respect to the condition of the title, and had refused to have anything to do with the defense of the case, insisting that he had no interest in the matter. However desirable it may be that written notice should be given in such cases, and the court has so intimated in the case of *Beasley v. Phillips* (1898), 20 Ind. App. 182, 50 N. E. 388, we see no necessity for it in the practice, as the essential thing is that the grantor of a defective title should have knowledge that the title is being assailed. Then, when demand is made upon him to defend, it becomes his duty, under the law, to see that the rights of his grantee, as well as his own rights are protected, so that the failure to give written notice cannot be held to be a defense to this action. This is very aptly stated in appellee's brief as follows: "When a party has full notice of an action pending which will affect his rights, he can not be supinely neglectful and afterwards set up a tenuous technicality in claiming that he was not notified." *Worley v. Hineman* (1893), 6 Ind. App. 240, 33 N. E. 260; *Reasoner v. Edmundson* (1854), 5 Ind. 393; *Marvin v. Applegate* (1862), 18 Ind. 425, 428; *Bever v. North* (1886), 107 Ind. 544, 8 N. E. 576; *Hannah v. Henderson* (1853), 4 Ind. 174.

It is further insisted that the grantee who accepts a deed and is put in possession of the real estate, until he is evicted or put to actual trouble and expense, can re-

2. cover only nominal damages from his grantor because of any defect in the title. It may be said there is no assignment here that the judgment is excessive, therefore

this question is not directly presented, but it is very ably argued, and on that account we give it consideration. Appellant cites and relies upon the case of *Small v. Reeves* (1860), 14 Ind. 163, 164, in which the court holds: "Where a deed is made and accepted and possession taken under it, want of title will not enable the purchaser to resist the payment of the purchase money, or recover more than nominal damages on his covenants, while he retains the deed, and possession, and has been subjected to no inconvenience or expense on account of the defect of title. This is, in many of the cases, because the purchaser's possession, being under color of title, may continue undisturbed for twenty years, and thus become perfect, and he be uninjured. And he may rely on the covenants in his deed for redress if injury occurs." While this may be said to be the law of this State where the facts of the case permit its application, yet we think the rule can not be applied in the case under consideration because appellee was not only subjected to trouble, but went into court and sought to have his title quieted after having discovered its defect, where a judgment was recovered against him for the sum of \$505.20, together with costs and expenses, which judgment amounts to an eviction. *Mooney v. Burchard* (1882), 84 Ind. 285; *Wright v. Nipple* (1883), 92 Ind. 310; *Hannah v. Henderson, supra*; *Black v. Duncan* (1878), 60 Ind. 522. So that it is clear that the principle contended for in the case of *Small v. Reeves, supra*, has no application to the facts in this case.

It is very earnestly argued by appellant that there would have been no eviction, no expense and no trouble except for the fact that appellee instituted the suit to quiet title

3. himself, thus apprising the Whitworth heirs of their interest in the land and inviting the contest to determine the ownership of the one-third thereof; that if appellee had remained silent he might have retained possession for a period of twenty years, and thus have acquired title to the real estate and been uninjured. We think this posi-

tion is likewise untenable. The purchaser of real estate in this day of activity in trade, and frequent transfers of property who discovers a defect in his title, upon his effort to make a desirable sale, can not be held obliged to remain silent for a period of twenty years and perhaps sustain serious losses on account thereof, but he has the clear right to notify the grantor of the defect in the title, and if the grantor refuses, as in this case, to assume the burden of curing the defect, then the grantee may go into court, have the title determined, and compel his grantor to respond in damages in such amount as may be shown he has sustained. Any other rule would impose a burden upon the purchaser of real estate to hold it for a period of twenty years before he might be able to enjoy the full benefits thereof. This doctrine

could have no application in the case at bar for the
4. additional reason that his title could never have ripened as against the rights of the Whitworth heirs, who were his tenants in common. A tenant in common can never acquire title against another tenant in common, unless there is constructive or actual ouster, as the possession of one is the possession of all. *Wilber v. Buchanan* (1882), 85 Ind. 42, 45.

In the case of *Worley v. Hineman, supra*, the court says: "In that case, any breach calculated to disturb the grantee in the enjoyment of his property is covered by his
2. covenant, embracing as it does a guaranty for future as well as present enjoyment. He may wait until he is evicted and then sue, or he may pay off the incumbrance and bring his action, provided he finds it necessary to extinguish the incumbrance in order to ward off an eviction if the land is legally bound." See, also, *Black v. Duncan, supra*; *Coleman v. Lyman* (1873), 42 Ind. 289. Appellant seeks in a very able argument to make a distinction between cases where a grantee voluntarily makes payment when he discovers there is a paramount title, and where he brings suit to determine the question of the validity of the para-

mount title. It is settled that when a grantee discovers that there is a paramount title to the one under which he holds, he may, in order to relieve himself of trouble and expense purchase the paramount title, or pay off an incumbrance or lien, and compel his grantor to respond in such damages as he has sustained. *Mooney v. Burchard, supra*. We can see no difference in principle between the two conditions. The grantee, upon discovering a defect in his title, brought a proper action in a proper court, and a judgment was recovered against him, holding paramount title in some other person, which amounts to an eviction. *Wright v. Nipple, supra*. He may pay the judgment, as in this case, and in a proper action compel his grantor to repay him the amount expended, together with expenses necessarily incurred, including attorney fees. *Worley v. Hineman, supra*, 255.

The decision of the court is sustained by sufficient evidence and is not contrary to law. Judgment affirmed.

NOTE.—Reported in 104 N. E. 598. As to actions for breach of covenant of warranty in deed, see 24 Am. St. 266. As to the necessity of eviction to maintenance of action for breach of covenant of warranty of title, see 17 L. R. A. (N. S.) 1178. See, also, under (1) 11 Cyc. 1103; (2) 11 Cyc. 1129; (4) 38 Cyc. 21.

MILLER v. MILLER.

[No. 8,225. Filed March 20, 1914.]

1. DIVORCE.—*Complaint.—Residence.*—The facts embraced in the requirement of §1066 Burns 1908, §1031 R. S. 1881, that the applicant for a divorce shall have been a *bona fide* resident of the State for the last two years, and of the county for at least six months, immediately preceding the filing of the suit, are jurisdictional and their existence should be averred in the complaint or petition. p. 648.
2. DIVORCE.—*Complaint.—Residence.—Affidavit.*—Where a complaint for divorce is verified, and in addition to its own necessary jurisdictional averments contains the facts as to residence and occupation required by §1066 Burns 1908, §1031 R. S. 1881, to be shown by affidavit, a separate affidavit is not necessary. p. 649.

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3. **DIVORCE.—Complaint.—Residence.**—The allegation of a complaint for divorce, that “plaintiff is now, and has been for more than two years last past, a *bona fide* resident of Howard County in the State of Indiana,” sufficiently showed the jurisdictional facts as to residence, as required by §1066 Burns 1908, §1031 R. S. 1881, where the action was brought in the county named. p. 649.
4. **DIVORCE.—Showing as to Residence and Occupation.—Statutes.**—The requirement of §1066 Burns 1908, §1031 R. S. 1881, as to a showing of residence and occupation by affidavit accompanying a complaint for divorce, is mandatory in that there must be a substantial compliance as to each fact required to be presented by such affidavit, and since the manifest intent of the statute is to prevent the procurement of divorces by nonresidents through fraud or imposition on the courts, such intent must be considered in determining the sufficiency of the showing contained in such an affidavit; and where, in lieu of a separate affidavit, the facts literally required to be shown thereby are attempted to be set out in a verified complaint, all the facts pleaded bearing on the sufficiency of the showing will be considered, and if a case apparently free from suspicion is presented a relatively wider departure from strict compliance will be construed as a substantial compliance. p. 649.
5. **DIVORCE.—Complaint.—Allegations.—Occupation.**—A general averment that plaintiff in a divorce action was a housekeeper, sufficiently complies with the statutory requirement as to statement of the applicant's occupation. p. 650.
6. **DIVORCE.—Complaint.—Averments as to Domicile.**—A departure from the statutory language concerning domicile will not be fatal in a complaint for divorce, where the facts conferring jurisdiction can be gathered from the entire pleading. p. 650.
7. **DIVORCE.—Complaint.—Showing as to Residence and Occupation.**—A verified complaint for divorce, containing general averments as to residence and occupation of plaintiff, and stating facts from which it appeared that plaintiff was a *bona fide* resident of a specified township in the county for the required time, sufficiently complied with §1066 Burns 1908, §1031 R. S. 1881, requiring an affidavit accompanying a complaint for divorce showing certain facts as to residence and occupation. pp. 651, 652.
8. **DIVORCE.—Complaint.—Allegations.**—The allegation in a complaint for divorce showing plaintiff's residence in Howard County, and in Center Township, is equivalent to an allegation that Center Township mentioned is in Howard County. p. 652.
9. **EVIDENCE.—Judicial Notice.—Presumptions.**—The court takes judicial notice that the city of Kokomo is in Center Township, Howard County, Indiana, that there is no other city of Kokomo

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in the State, and that there is a Clay Township in said county; and where a complaint for divorce filed in the circuit court of that county contained allegations respecting Clay Township and the city of Kokomo, it will be presumed that the Clay Township mentioned is Clay Township in said county. p. 652.

10. **DIVORCE.—Complaint.—Verification.—“Subscribe.”**—The word “subscribe” when applied to the act of signing one’s name to an instrument in writing, means the signing of such name beneath or at the end of such instrument, hence it sufficiently appears that a complaint for divorce was subscribed and sworn to by plaintiff, where her name is signed at the conclusion of the pleading and followed by the officer’s jurat merely stating that the instrument was subscribed and sworn to, but not stating by whom, and this notwithstanding the names of the attorneys also appear at the close of such pleading. p. 653.
11. **EVIDENCE.—Judicial Notice.**—The court on appeal cannot judicially know that a witness who testified in the case, and whose name is the same as one of the attorneys, is the same man as the attorney. p. 654.
12. **DIVORCE.—Witnesses.—Competency.—Residence.**—A witness who testified that he was a freeholder and householder, but did not testify as to his residence or domicile, was not qualified under §1066 Burns 1908, §1031 R. S. 1881, to testify as to the residence of plaintiff in a divorce action. p. 654.
13. **DIVORCE.—Witnesses.—Competency.—Residence.**—Since an action for divorce is impliedly classed as a civil action, and the civil code (§519 Burns 1908, §496 R. S. 1881) provides that parties to a suit are competent witnesses except in certain cases, and in view of the fact that the divorce act does not disqualify a witness on account of interest, plaintiff in a divorce suit, who qualified as any other witness for that purpose, was competent to testify in her own behalf on the subject of her residence. p. 655.
14. **DIVORCE.—Witnesses.—Competency.—Residence.**—The qualification of a witness to prove residence of plaintiff in a divorce suit need not be established by formal and express proof, and it is sufficient if the evidence as a whole clearly establishes that such witnesses are resident freeholders and householders of the State. p. 656.
15. **DIVORCE.—Evidence.—Residence.**—The fact of plaintiff’s residence for the time required by the divorce act (§1066 Burns 1908, §1031 R. S. 1881) need not be established by formal and express proof, but it is sufficient if, as a whole, the testimony of at least two qualified witnesses establishes the fact of residence for the required time to the satisfaction of the court. pp. 656, 657.
16. **DIVORCE.—Witnesses.—Qualification.—Evidence.**—Evidence showing that plaintiff in a divorce suit was compelled to leave

the common home of herself and husband, that she left with no intention of returning and rented a house at the county seat, where she and a minor daughter were living at the time of the trial, together with evidence showing that she owned real estate in the county, sufficiently showed her qualification as a witness in her own behalf on the question of her residence. p. 656.

17. **DIVORCE.—Evidence.—Sufficiency.—Residence.**—Where the testimony of plaintiff in a divorce suit showed that at the time of filing the complaint she was, and for more than two years immediately prior thereto had been a *bona fide* resident of the county and State, it together with the testimony of another qualified witness to the same effect, was sufficient to show residence within the requirements of §1066 Burns 1908, §1031 R. S. 1881. p. 658.
18. **DIVORCE.—Evidence.—Sufficiency.**—A judgment for plaintiff, in a divorce action, having evidence to support it, will not be reversed on the evidence, although such evidence was conflicting and showed that at times plaintiff participated in physical encounters with defendant. p. 658.
19. **DIVORCE.—Alimony.—Review.**—The amount of alimony to be allowed is within the discretion of the trial court, which should be exercised with a view to the wealth of the parties and their sources of income, their ages, health, needs, innocence or culpability in the matter tried, and all other elements bearing upon the subject, and on appeal it will be presumed that such discretion has been properly exercised, so that in the absence of a showing to the contrary an allowance made by the trial court will not be interfered with. p. 658.

From Howard Circuit Court; *Leroy B. Nash*, Special Judge.

Action by Caroline M. Miller against Henry C. Miller. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Overton & Joyce, for appellant.

Blacklidge, Wolf & Barnes, for appellee.

CALDWELL, J.—Action by appellee against appellant for divorce and alimony. The complaint, filed on April 3, 1911, charges as causes for divorce, cruel treatment and the failure to make reasonable provision for the support of appellee. Appellant filed a general denial to the complaint, and filed also a cross-complaint which appellee answered by general

denial. Trial before a special judge, resulting in a judgment in favor of appellee for a divorce and alimony in the sum of \$3,500, and an allowance of \$350 for attorney fees.

The first question presented is as to the sufficiency of the jurisdictional facts as shown by appellee's pleadings. The statute applicable to such question, as well as to several other questions presented and hereinafter discussed, is as follows: "Divorce may be decreed by the superior and circuit courts of this state, on petition filed by any person who, at the time of the filing of such petition, is and shall have been a *bona fide* resident of the state for the last two years previous to the filing of the same, and a *bona fide* resident of the county at the time of and for at least six months immediately preceding the filing of such petition; which *bona fide* residence shall be duly proven by such petitioner, to the satisfaction of the court trying the same, by at least two witnesses who are resident freeholders and householders of the state. And the plaintiff shall, with his petition, file with the clerk of the court an affidavit subscribed and sworn to by himself, in which he shall state the length of time he has been a resident of the state, and stating particularly the place, town, city, or township in which he has resided for the last two years past, and stating his occupation, which shall be sworn to before the clerk of the court in which said complaint is filed."

§1066 Burns 1908, §1031 R. S. 1881. Said statute contains three distinct requirements: (1) Respecting the existence of certain specified jurisdictional facts as to residence; (2) the degree and manner of proof of such facts; (3) the nature and contents of an accompanying affidavit. Although

the statute does not in terms so specify, still, since the

1. facts within such first requirement are jurisdictional, their existence should be averred in the petition or complaint. *Powell v. Powell* (1876), 53 Ind. 513.

Appellee did not file with her complaint a separate affidavit. It is claimed in her behalf, however, that the complaint contains in addition to its own necessary jurisdictional aver-

ments, the facts required by statute to be presented

2. by such an affidavit, and it is claimed also that the complaint was subscribed and sworn to by appellee. If such claims be valid, there is a sufficient compliance with the statute, as in such case a separate affidavit is not necessary. *Stewart v. Stewart* (1902), 28 Ind. App. 378, 62 N. E. 1023.

The complaint contains the following averment:

3. "Plaintiff further alleges that she is now, and has been for more than two years last past, a *bona fide* resident of Howard County in the State of Indiana." Such averment is a sufficient compliance with the first requirement of the statute. *Polson v. Polson* (1895), 140 Ind. 310, 39 N. E. 498.

As to whether the facts embraced by the third requirement are sufficiently alleged in the complaint presents a more difficult question. It is held that said statutory

4. requirement as to the contents of such affidavit, or in this case, as to the contents of the complaint, is so far mandatory that there must be a substantial compliance therewith. While a substantial compliance satisfies the statute, there must be such a compliance as to each of the facts required to be presented by such an affidavit. A concession that a substantial compliance is sufficient, compels the conclusion that a strict or literal compliance is not in all cases required. In determining what constitutes a substantial compliance as a general proposition, it would seem to be legitimate to consider the legislative intent that inspired the enactment. On this subject, the Supreme Court says: "Manifestly, the legislative intent in the enactment of these provisions was to limit the operation of the statute to *bona fide* residents of the State, and to restrain and prevent the procurement of divorces by non-residents through fraud or imposition practiced on the courts." *Eastes v. Eastes* (1881), 79 Ind. 363, 368. See, also, *Wills v. Wills* (1911), 176 Ind. 631, 96 N. E. 793. Where, as here, the pleader undertakes to include in a verified complaint facts as to resi-

dence and occupation, literally required to be presented by affidavit, it would seem that all the facts pleaded bearing on such questions should be considered, and, if so viewed such facts present a case apparently free from suspicion, a relatively wider departure from a strict compliance should be construed as a substantial compliance. Such is the spirit of the decision in *Hunter v. Hunter* (1902), 64 N. J. Eq. 277, 53 Atl. 221. The statutory provision above quoted respecting the contents of the affidavit is as follows: "And the plaintiff shall, with his petition file with the clerk of the court an affidavit subscribed and sworn to by himself, in which he shall state [1] the length of time he has been a resident of the state; [2] stating particularly the place, town, city or township in which he has resided for the last two years past, and [3] stating his occupation."

The complaint alleges that appellee is a housekeeper, which allegation satisfies the third provision. It contains also, as has been said, the allegation that appellee "is

5. now and has been for more than two years last past, a *bona fide* resident of Howard County in the State of Indiana," which allegation, in our judgment, is a
6. sufficient compliance with the first provision. There is the further allegation that appellee "is now a resident of Center Township." There is no general averment as to the town, city or township in which appellee resided during the two years immediately preceding the filing of the complaint.

While in any case, general averments of said required facts constitute a compliance with the terms of the statute, so it would seem that the same end may be attained by specific averments. Thus, appellee alleges in terms that her occupation is that of housekeeper. Had she in place of such general averment alleged specific facts as to her line of work, and how she occupied and used her hands and mind, and if such specific facts forced the conclusion that appellee is a housekeeper by occupation, such specific facts taken with

such conclusion arrived at therefrom would satisfy the statute. A departure from the statutory language concerning domicile will not be fatal if the facts conferring jurisdiction can be gathered from the entire pleading. 2 Nelson, Divorce and Separation §731. The pleading will be sufficient if facts are set out showing the required residence. 7 Ency. Pl. and Pr. 67.

Bearing on the question under discussion, the following facts are averred in the complaint: The parties were married in 1872, and lived together as husband and wife 7. until 1903, when they were divorced by the Howard Superior Court. They were remarried later in 1903, at which time appellant deeded a tract of land to appellee, retaining in his own name 128 acres, designated in the record as the "Home Farm." Many facts are averred showing many years of life together on the farm after said remarriage. It is further alleged that after said remarriage in 1903, the parties "have continued to live together in the same house until about the 20th day of March, 1911, when they separated and have not since lived or cohabited together." That prior to the separation, appellant notified various merchants of the city of Kokomo not to extend credit to appellee; that Ruth Miller, aged sixteen years, daughter of the parties, is attending the high school at Kokomo, and is about ready to graduate, and that appellant has refused to provide her any means to get back and forth from school, "and has refused to pay any livery bills when she drove from their home in Clay township," and has directed various merchants of the city of Kokomo not to extend credit to Ruth for clothing or food; that the married sons of the parties have been farming said two farms for several years. Facts are averred to the effect that in March, 1911, appellant forced appellee and the daughter Ruth to leave the home farm, and that appellee "has been compelled to rent a house in the city of Kokomo, and move to the same," and that the daughter Ruth now lives with appellee;

that appellee is now and has been for more than two years last past a *bona fide* resident of Howard County in the State of Indiana, and is now a resident of Center Township. The allegation of present residence in

8. Howard County, and in Center Township is equivalent to an allegation that Center Township mentioned is in Howard County. This court takes judicial knowledge that the city of Kokomo is in Center Township, Howard County, Indiana, and that there is no other city of

9. Kokomo in this State, and that there is a township in said county known as Clay Township. Allegations respecting Clay Township and said city of Kokomo are connected together in a pleading designed to be filed and actually filed in the Howard Circuit Court of Howard County, Indiana. Under such circumstances, it will be presumed that the Clay Township referred to is the Clay Township which the court judicially knows to be in Howard County. *Strode v. Strode* (1867), 3 Bush. (Ky.), 227, 96 Am. Dec. 211.

It sufficiently appears that after the remarriage and prior to the separation, the parties lived together at some time not definitely fixed, in Clay Township on the home

7. farm, but it is alleged that the parties “continued to live together in the same house” from the remarriage to the separation. We concede that the quoted language is possibly susceptible of more than one construction. It might be said that the second phrase merely excludes the supposition that one of them lived in one house and the other in a different house, but the second phrase is not necessary to that end, as the first phrase alone is inconsistent with such supposition. It might be said also that the second phrase qualifies the first, to the effect that the parties continued to live together only in the sense that they lived in the same house, but an allegation that they lived together, but not in the relation of husband of wife, would be more apt to that end. Moreover, the quoted allegation is closely connected with averments respecting a remarriage follow-

ing a reconciliation. The presumption arising from such a reconciliation and remarriage is in harmony with an hypothesis that the parties lived together in the relation of husband and wife, which hypothesis is consistent with the literal meaning of the phrase "in the same house," in which sense we construe said phrase to the effect that from said remarriage to said separation, the parties did not change their abode. It thus appears from the complaint that from 1903 to March 20, 1911, appellee lived in Clay Township, and thereafter to the filing of the complaint that she lived in Center Township, Howard County, Indiana. From a consideration of the complaint as a whole, there is formed a conception of residential stability and fixedness, rather than of the transient and roving. In the matter under discussion, we hold the complaint sufficient. *Hunter v. Hunter, supra*.

It is conceded by appellant that where the complaint contains the facts required by the statute to be presented by affidavit filed with the complaint, there is a sufficient

10. compliance with the statute, if it appears that the complaint was "subscribed and sworn to by the plaintiff". However, it is contended here that it does not appear that the complaint was so "subscribed and sworn to". The complaint, as set out in appellant's brief, appears to be signed by appellee's attorneys, as such, and at the conclusion thereof it is signed by appellee, following which is a jurat thus: "Subscribed and sworn to before me the undersigned", etc. Appellant states his position as follows: "The complaint is signed by Blackledge, Wolf & Barnes, and Caroline M. Miller, but the jurat does not show that plaintiff swore to it." That is, appellant concedes that it appears that appellee signed the complaint, but denies that there is a sufficient showing that she swore to it. Primarily, the word "subscribe" when applied to the act of signing one's name to an instrument in writing, means the signing of such name beneath or at the end of such instrument.

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Ashwell v. Miller (1913), 54 Ind. App. 381, 103 N. E. 37; *James v. Patton* (1851), 6 N. Y. 9, 55 Am. Dec. 376; *Lawson v. Dawson* (1899), 21 Tex. Civ. App. 361, 53 S. W. 64. It being admitted that appellee signed her name at the end of the complaint, it follows that she subscribed the complaint. It sufficiently appears that the person who subscribed the complaint was sworn to it also, and it therefore further follows that it sufficiently appears that the complaint was "subscribed and sworn to" by appellee. It may be said that the same line of reasoning would establish that said law firm also subscribed and swore to the complaint. If such be the fact, the complaint would not be thereby invalidated.

The second requirement of said quoted statute is as follows: "Which *bona fide* residence shall be proven by such petitioner to the satisfaction of the court trying the same by at least two witnesses, who are resident freeholders and householders of the state." Appellant takes the position that it does not appear that two witnesses of the requisite qualifications testified on the subject of appellee's residence, and that if it should be conceded that any two witnesses were shown to have such qualifications, their testimony was not broad enough in substance to establish the fact of appellee's residence, as required by the statute. Appellant does not contend that there was a failure on the part of the witness William H. Miller to qualify as aforesaid, or that his testimony was not broad enough to meet the requirements of the statute. We shall, therefore, treat him as one witness sufficiently qualified, and whose testimony satisfies the statute to that extent. Appellee asserts that Conrad

11. Wolf qualified as such a witness. Conrad Wolf testified that he was a freeholder and householder, but did not testify as to his residence or domicile. The

12. record, otherwise than by testimony offered at the trial, discloses that Conrad Wolf was one of the attorneys for appellee, and as such, that he was actively engaged in the trial. The Constitution provides that "Every

person of good moral character, being a voter, shall be entitled to practice law in all courts of justice.” Constitution, Art. 7, §21. From the foregoing, it is argued that Conrad Wolf must be a voter, as he was practicing law, and, therefore, that he must of necessity be a resident of the State of Indiana, and hence, considering also his said testimony, that he must be a freeholder and householder of the State. If it should be conceded that the argument is otherwise sound, still there was no evidence that Conrad Wolf, the witness, was the same man as Conrad Wolf, the lawyer. While there may be situations wherein identity of names raises a presumption of identity of persons, still we do not believe such a presumption could be indulged here. It is argued that it was within the province of the trial court to take judicial knowledge of such identity. By no means conceding the soundness of the argument that such an abstruse question as personal identity comes within the realm of facts which courts know judicially, still there is nothing in the record to indicate that the court here did take such judicial notice or that it was established by the exercise of judicial knowledge. If the trial court could take judicial notice of such fact, so could this court, and this court certainly does not know judicially that the witness was the same man as the attorney. The record does not show that Conrad Wolf qualified as a witness on the subject of appellee’s residence. See *Stephenson v. State* (1867), 28 Ind. 272.

It is claimed that appellee was a competent witness to testify in her own behalf on the subject of her residence, and that she qualified as such, and testified on said
13. subject. First as to her competency—the statute provides that the fact of such residence, as required, must be proven by “at least two witnesses who are resident freeholders and householders of the State.” There is no qualifying term such as “disinterested” or “impartial.” The code provides that “All persons, whether parties to or interested in the suit, shall be competent witnesses in a civil

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action or proceeding, except as herein otherwise provided.” §519 Burns 1908, §496 R. S. 1881. The situation here does not come within any of the exceptions that follow. A proceeding for divorce is impliedly classed as a civil action by the divorce act. §1079 Burns 1908, §1041 R. S. 1881. Appellee was a competent witness to testify in her own behalf in support of her cause of action. *Smith v. Smith* (1881), 77 Ind. 80. There is no provision of the divorce act or of the code that excludes appellee as a witness on the subject of her own residence, and in view of the foregoing statutory provisions construed together, we hold that appellee was a competent witness to testify respecting her own residence.

The next question is as to whether appellee qualified
14. as such a witness. It does not appear that she testified in terms that she was a resident freeholder and householder of the State. On the trial of an action
15. for divorce, it is not necessary that the qualification of a witness who testifies on the subject of the plaintiff’s residence be established by formal and express proof. The same is true also of the fact of such residence for the time required. It is sufficient if the evidence as a whole clearly establishes that such witnesses are in fact resident freeholders and householders of the State, and establishes also “to the satisfaction of the court trying the cause” by the testimony of at least two such qualified witnesses that plaintiff at the time of filing her petition was and immediately prior thereto had been a *bona fide* resident of the county and State during the respective periods required by the statute. *Maxwell v. Maxwell* (1876), 53 Ind. 363; *Blauser v. Blauser* (1909), 44 Ind. App. 117, 87 N. E. 152; *Rosinakowski v. Rosinakowski* (1904), 34 Ind. App. 128, 72 N. E. 485.

At the trial, appellant offered no evidence on the subject of the qualification of any such witness or on the sub-
16. ject of appellee’s residence, but left these questions where the evidence offered by appellee left them.

They must be determined then from the testimony introduced by appellee. The statute does not require that the fact, that a certain witness is or is not a resident freeholder and householder of the State, be established by the evidence of that witness alone. Such fact may be proven by any competent evidence. It is not controverted that a married woman may become a householder. As she may acquire a domicile other than the domicile of her husband, so she may become a householder. There was evidence tending to show that appellee was compelled to leave the common home of herself and husband, by reason of the mistreatment that she received at his hands, and his failure to make reasonable provision for her support and the support of the daughter Ruth; that she did so leave with no intention of returning; that thereupon she rented a house in the city of Kokomo; that at the time of the trial she was living in said house and maintaining a separate establishment and keeping boarders as a partial means of livelihood; that the daughter Ruth was living with her, and being maintained by her. There was also evidence that she owned real estate in Howard County, Indiana, in her own right. These facts appear from the testimony of appellee and others, including the daughter Ruth. The evidence was sufficient to show that at the time of the trial, appellee was a resident freeholder and householder of the State. *Kenley v. Hudelson* (1881), 99 Ill. 493, 500, 39 Am. Rep. 31; *Tolen v. Tolen* (1831), 2 Blackf. 407, 21 Am. Dec. 742; *Rosinakowski v. Rosinakowski*, *supra*; 21 Cyc. 1114; 9 Am. and Eng. Ency. Law (2d ed.) 736; 7 Standard Ency. Proc. 747; *Jenness v. Jenness* (1865), 24 Ind. 355, 87 Am. Dec. 335.

Appellee did not in terms testify to the fact of her residence in the county and State during the respective required periods. However, as we have said, it was not neces-

15. sary that such fact be established by formal proof.

Such fact may be proven in the same manner as any other essential fact, provided it be by the testimony

of the requisite number of qualified witnesses. We
17. have read carefully all that appellee testified to as a witness in her own behalf. To analyze her testimony in relation to the present discussion would extend this opinion beyond justification. From such testimony, with reasonable deductions and inferences therefrom, to us, it clearly appears that she testified that at the time of the filing of the complaint she was, and for a very much longer period than two years immediately prior thereto had been, continuously a *bona fide* resident of the State of Indiana, and of Howard County in said State. Appellee's testimony, with the testimony of William H. Miller, was sufficient to meet the requirements of the statute.

Appellant challenges the sufficiency of the evidence to sustain the decision of the trial court on the body of the cause of action, and claims particularly that the evidence
18. shows that appellee, as well as appellant was at fault.

The evidence, which is in a measure conflicting, shows many years of domestic discord and turmoil, with frequent outbreaks, resulting in physical encounters, involving the immediate parties and the members of the family. That appellee at times participated in these encounters does not necessarily convict her of fault. The law recognizes that the actual inflicting of physical injury is, under some circumstances, excusable. The situation presented was peculiarly for the consideration of the trial court. The evidence favorable to appellee is abundantly sufficient to sustain the court's decision.

The question is properly presented as to whether the court erroneously decreed in favor of appellee alimony excessive in amount. The alimony judgment is in the sum of
19. \$3,500, in addition to which the court awarded to appellee the sum of \$350 with which to pay the fees of her attorneys. Appellee was given the custody of the daughter Ruth, with no order against appellant for her support. There were no other minor children. No com-

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plaint is made of the allowance for attorney's fees. The parties were first married in 1872, and at that time had comparatively little property. They were divorced in 1903, at which time appellee became the owner of 20 acres of land, or of an undivided one-half interest in 40 acres, apparently by reason of the parties owning said forty acres as tenants by the entirety. In the first divorce proceeding, appellee recovered a judgment as alimony in the sum of about \$4,000. At the time of the remarriage, appellant conveyed the 72-acre tract to appellee, which with said twenty acres made a total of 92 acres owned by her. She thereupon released her said judgment. At the time of the trial, appellant was free from debt, and owned 128 acres, worth \$140 per acre, and had in addition about \$2,000 in notes and money. Appellee owned said 92 acres, worth \$140 per acre, but encumbered by a \$500 mortgage, and had about \$150 in money. From the evidence, it appears that the parties were industrious and frugal, and that practically all of said property was accumulated as a result of their joint earnings. The matter of the amount of alimony is wisely committed to the judicial discretion of the trial court. In allowing alimony, the court should take into consideration the respective amounts of property owned by the parties, the sources from which it came, the encumbrances thereon, the debts owing, the income that may reasonably be expected to be derived from such property, the age of the parties, physical health, physical or financial needs, the innocence or culpability of each in the matter tried, and all other elements needful to the exercise of a wise discretion. It is presumed that the trial court has performed its duty, and has properly exercised such discretion. We cannot say from the record that such discretionary power has been abused, and under such circumstances it is beyond our province to interfere.

There being no error in the record, the judgment is affirmed.

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NOTE.—Reported in 104 N. E. 588. As to alimony and the allowance of it, see 60 Am. Dec. 664. As to the necessity of the allegation of the residence of the plaintiff in a petition for divorce, see 12 Ann. Cas. 1092. As to judicial notice of geographical facts, see 12 Ann. Cas. 927. See, also, under (1, 3) 14 Cyc. 663; (2) 14 Cyc. 678; (9) 16 Cyc. 859; (10) 31 Cyc. 525; 36 Cyc. 449; (12, 14) 14 Cyc. 692; (13) 14 Cyc. 691; (18) 14 Cyc. 735; (19) 14 Cyc. 769, 771, 803.

WOLF v. RUSSELL ET AL.

[No. 8,248. Filed March 20, 1914.]

1. CHATTEL MORTGAGE.—*Absolute Bill of Sale as Mortgage.—Evidence.*—Evidence showing that at the time of the execution of a bill of sale to plaintiff, absolute on its face, for sixteen stacks of hay, the person who executed same was indebted to plaintiff in a sum equal to the amount specified as the purchase price, that plaintiff had never seen the hay, that its total value was much greater than the specified purchase price, that the hay was purchased by plaintiff "to satisfy purchase money" to the amount specified, was sufficient, in the absence of any showing that plaintiff had ever taken either actual or constructive possession, to warrant the finding that the instrument was simply a chattel mortgage to secure a preëxisting debt. p. 661.
2. CHATTEL MORTGAGE.—*Failure to Record.—Possession of Chattels.—Rights of Mortgagee.*—Failure to record a chattel mortgage rendered it invalid as against a third person who purchased the property covered thereby, and, as against him, such mortgage was insufficient to give the mortgagee any right of possession. p. 662.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Action by Thomas J. Wolf, Jr., against Marion L. Russell and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Frank Foltz, for appellant.

Abraham Halleck, for appellees.

HOTTEL, J.—This is an appeal from a judgment in favor of appellees in a replevin action brought by appellant to recover possession of sixteen stacks of hay located on certain real estate in Jasper County, Indiana. The error assigned

and relied on by appellant is that of the ruling on his motion for a new trial. It is insisted that the decision of the trial court is not sustained by sufficient evidence, and is contrary to law.

Appellant based his right to recover possession of the hay in suit on an instrument introduced in evidence which, on its face, purports to be a bill of sale thereof executed by appellee Reid who was, at the time, the owner of such hay and the real estate on which it was located. Reid afterwards sold to appellee Russell the real estate and all the personal property thereon, including such hay.

The only question presented by the appeal is whether there was any evidence which authorized the trial court to treat said instrument as a mortgage given to secure a pre-
1. existing debt, rather than a bill of sale. The instrument was acknowledged, but was not recorded. It was practically admitted that the appellee Reid at the time he agreed to give the bill of sale, owed the appellant, on account of money advanced on hay bought by appellant the previous year, \$210.73, the amount specified in the bill of sale as the amount of the purchase price of the hay described therein. The appellant had never seen the hay when such instrument was executed. The number of tons or the price per ton for the hay was not mentioned at the time of its execution. And, as appellant himself says, the purpose of his visit to appellee Reid at that time was "to get on the ground floor and make himself safe and secure." There is no evidence that appellant took possession either actual or constructive of such hay under such bill of sale. Appellant wrote appellee Russell a letter in which he told him in substance that he had contracted and paid for, at \$4.50 a ton, enough of the hay on the farm which he (Russell) had bought from appellee Reid "to satisfy purchase money amounting to \$210.73." At such figure the total value of the sixteen stacks of hay as shown by other evidence would have been over \$375. The evidence of appellee Reid and

his conduct tended in some degree at least to show that he treated the bill of sale as security for his debt and that when he sold the real estate he wanted appellee Russell to assume and agree to pay the debt, which Russell says he refused to do. We have indicated enough of the evidence to show, we think, that the trial court had at least some evidence before it, which under the authorities justified it in inferring that said instrument was intended by the parties thereto, to evidence a security for a preëxisting debt, and not to evidence an absolute sale of the property in discharge of such debt, and that it was afterwards treated both by appellant and appellee Reid as a mortgage rather than an instrument of absolute sale of the property therein described.

Appellant having failed to have such instrument recorded, it is invalid as against appellee Russell and hence as to him

was insufficient to give to appellant any right to

2. possession of the property described therein. The conclusion herein reached we think is supported by the following authorities: §7472 Burns 1908, Acts 1897 p. 240; *Seavey v. Walker* (1886), 108 Ind. 78, 81, 9 N. E. 347, and authorities cited; *Lumbert v. Woodard* (1896), 144 Ind. 335, 43 N. E. 302, 55 Am. St. 175; *Plummer v. Shirley* (1861), 16 Ind. 380; *Mullenkopf v. Baumgardner* (1900), 21 Ohio C. C. R. 591, 11 Ohio C. D. 655; *Gibbons v. Gibbons, etc., Milling Co.* (1906), 37 Colo. 96, 86 Pac. 94; Jones, Chattel Mortgages §§22, 23. See, also, *Geisendorff v. Eagles* (1886), 106 Ind. 38, 5 N. E. 743; *Higgins v. Spahr* (1896), 145 Ind. 167, 43 N. E. 11; *Clark v. Williams* (1906), 190 Mass. 219, 76 N. E. 723; *Wetmore v. Moloney* (1901), 127 Mich. 372, 86 N. W. 808; *Hawes v. Weeden* (1901), 180 Mass. 106, 61 N. E. 802; *Rairden v. Hedrick* (1912), 46 Mont. 510, 129 Pac. 498, 499. Judgment affirmed.

NOTE.—Reported in 104 N. E. 603. As to the registration of chattel mortgages, see 21 Am. St. 282. As to the effect of failure to record chattel mortgage, see 137 Am. St. 471. See, also, under (1) 6 Cyc. 992; (2) 6 Cyc. 1072.

FIRST NATIONAL BANK OF RENSSELAER v. RANSFORD.

[No. 8,283. Filed March 20, 1914.]

1. **APPEAL.—*Sufficiency of Complaint.—Waiver of Defects.—Briefs.***
—Reasons for the alleged insufficiency of a complaint are waived on appeal by appellant's failure to present in its brief any point, proposition or authority in support of same. p. 665.
2. **CONVERSION.—*Acts Constituting.***—Where one receives the money of another, with directions to apply it to the payment of a debt owing by the latter to a third person, and in disregard of such directions applies the same to his own or some other use, such use is wrongful and amounts to a conversion of the money so applied. p. 665.
3. **CONVERSION.—*Complaint.—Demand.***—A complaint for the conversion of money or property is sufficient without alleging a demand before suit, where the facts alleged show an actual conversion. p. 665.
4. **CONVERSION.—*Complaint.—Sufficiency.***—The essence of conversion is the wrongful invasion of one's property right by another, and while there can be no such invasion where the latter's possession was rightfully obtained, except upon demand for possession by the former and refusal by the latter, a complaint which averred that plaintiff sold a note and mortgage to defendant with specific directions that the proceeds should be applied to the payment of a certain debt owing by plaintiff, and that defendant subsequently disregarded such directions and applied the money to the payment of the debt of another without plaintiff's knowledge or consent, charged an actual conversion and was sufficient without alleging demand although possession in the first instance was rightfully acquired by defendant. p. 666.
5. **BILLS AND NOTES.—*Value.—Interest.—Pleading.***—A promissory note is *prima facie* worth the specified amount, so that in view of the fact that its interest value is a mere matter of mathematical calculation, an allegation of the amount of a note is sufficient to show its value as a matter of pleading. p. 667.
6. **APPEAL.—*Questions Waived.—Causes for New Trial.—Briefs.***
Causes assigned in a motion for new trial are waived on appeal by appellant's failure to present them in the briefs. p. 667.
7. **CONVERSION.—*Evidence.—Sufficiency.***—In an action against a bank for the conversion of the proceeds of a note and mortgage purchased from plaintiff, evidence showing that plaintiff sold same to defendant with directions to apply the proceeds to a certain purpose, though conflicting, together with undisputed evidence that the amount had been credited on a debt owing to

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defendant from plaintiff's husband, and that plaintiff had thereafter unsuccessfully demanded the amount of the note and interest, was sufficient to warrant a verdict for plaintiff. p. 667.

8. *APPEAL.—Review.—Merits Fairly Tried.—Affirmance.*—Where it appears that the issues in a cause were fully and fairly tried out on the merits of the controversy, and that substantial justice has been attained, intervening errors will be deemed harmless and the judgment will be affirmed. p. 668.

From Jasper Circuit Court; *Charles W. Hanley*, Judge.

Action by Margaret Ransford against The First National Bank of Rensselaer. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

George A. Williams, for appellant.

John A. Dunlap and *William H. Parkinson*, for appellee.

FELT, J.—Appellee recovered judgment against appellant for \$446.67, damages, for the alleged conversion of the proceeds of a certain note and mortgage. The case was tried on the second paragraph of the complaint to which a demurrer for alleged insufficiency of facts to state a cause of action, was overruled. The errors assigned and relied on for reversal are the overruling of the demurrer to the second paragraph of complaint, overruling the motion to modify the judgment and the motion for a new trial.

The second paragraph of the complaint in substance, charges that on February 26, 1910, Edward V. Ransford, the husband of appellee, was indebted to the appellant bank in a large sum; that on that date appellee was indebted to Elizabeth Alter in the sum of \$1,500, which was "secured by a mortgage upon a certain piece of real estate in the city of Rensselaer, Indiana"; that on said date appellee was the owner of a certain note and mortgage for \$400, dated February 10, 1910, which mortgage was upon certain real estate therein described, signed by Alfred Loman, payable to appellee, and due August 11, 1912; that on February 26, 1910, appellee sold and assigned the note and mortgage to said bank "in consideration of the sum of \$400 and the accumulated in-

terest on said note, which said sum the plaintiff directed and instructed the defendant to pay upon plaintiff's indebtedness to the said Elizabeth Alter, and the defendant promised and agreed that they would so pay out said money"; that appellant took and accepted the assignment of the mortgage but wholly disregarded the instructions and directions of this appellee, and wrongfully took the money and credited the amount thereof upon the account of Edward V. Ransford, without her knowledge or consent and she "received nothing as the proceeds of said sale of said mortgage to the defendant herein."

The defendant, now appellant, specified certain reasons for the alleged insufficiency of the complaint, but by failure to present any point, proposition or authority in support of such reasons, it has waived all but two, viz., (1) failure to allege a demand for the money, the proceeds of the mortgage and (2) failure to allege the value of the property converted.

The complaint is drawn on the theory of the conversion by appellant of the proceeds of the note and mortgage for \$400 and interest, alleged to have been sold to appellant by appellee, with specific directions as to the application of the proceeds. Where one person receives the money of another, with directions to apply it to a particular use (as in this instance, the payment of appellee's debt), and in disregard of such directions, applies the same to his own use, or the use of a third person, such use is wrongful and amounts to the conversion of the money so misapplied. *Terrell v. Butterfield* (1883), 92 Ind. 1, 10; *Kidder v. Biddle* (1895), 13 Ind. App. 653, 658, 42 N.E. 293; *Bunger v. Roddy* (1880), 70 Ind. 26, 28; *Armacost v. Lindley* (1888), 116 Ind. 295, 296, 19 N. E. 138; *Fort v. Wells* (1896), 14 Ind. App. 531, 533, 43 N. E. 155, 56 Am. St. 316; *Shearer v. Evans* (1883), 89 Ind. 400, 404; *Stewart v. Long* (1896), 16 Ind. App. 164, 166, 44 N. E. 63. Where the facts alleged show an actual conversion of the money or prop-

erty, the complaint is sufficient without showing a demand for the same before suit. *Nelson v. Corwin* (1877), 59 Ind. 489, 490; *Proctor v. Cole* (1879), 66 Ind. 576, 579; *Cox v. Albert* (1881), 78 Ind. 241, 244; *Buntin v. Pritchett* (1882), 85 Ind. 247, 250; *Koehring v. Aultman, Miller & Co.* (1893), 7 Ind. App. 475, 480, 34 N. E. 30.

The complaint in this case does not use the word conversion but it clearly shows the sale of the note and mortgage to appellant and the specific directions of appellee as 4. to the use of the money. It also alleges the promise of appellant to apply the money in accordance with such directions and further charges that it wholly disregarded the same and wrongfully applied the money to the payment of a debt of a third person without appellee's knowledge or consent, and shows her damage by alleging that she received no consideration for the note and mortgage. The essence of every conversion is the wrongful invasion of the right to, and absolute dominion over, property owned, or controlled, by the person deprived thereof, or of its use and benefit. *Kidder v. Biddle, supra*, and cases cited. In this case, the complaint shows that appellant came into the lawful possession of the note and mortgage and the proceeds thereof. The conversion is shown by the application of the funds to the payment of a debt of a third party, without authority and in violation of the directions of appellee, and the agreement of the parties. The case at bar is unlike that class of cases where money or property is rightfully in the possession of another, who has neither misused nor misapplied the same nor refused to surrender the possession thereof to the one entitled thereto. Such possession is not unlawful and in the absence of a demand for the possession by the party entitled thereto and a refusal to surrender the same, there is no invasion of the rights of property and no conversion. The wrongful refusal on demand, to pay over, or surrender possession, however, is a tortious act, and in such cases must be alleged and proved to make out a case of

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conversion. *Dodds v. Vannoy* (1878), 61 Ind. 89, 90; *Terrell v. Butterfield*, *supra* 9, 10. The allegations of this complaint show a conversion of the proceeds of the note and mortgage and it is sufficient without the allegation of a demand.

A promissory note is a promise to pay a definite sum of money and is *prima facie* worth the specified amount. In-

terest is a matter of calculation, and in law that is

5. certain which may be ascertained by mathematical calculation. If there is a defense to the note, or anything rebutting the presumption that it is worth its face value, such matters may be shown in defense, but as a question of pleading, the allegation of the amount of the note is sufficient to show its value. *Harlan v. Brown* (1892), 4 Ind. App. 319, 324, 30 N. E. 928. The complaint was sufficient and no error was committed in overruling the demurrer thereto.

The motion for a new trial specifies various causes, but all are waived by failure to present them in the briefs, except

those alleging that the verdict of the jury is not sus-

6. tained by sufficient evidence and errors in the instructions of the court. In construing the complaint as stating a cause of action for the conversion of the proceeds of the note and mortgage, we have in effect met the objection that the verdict of the jury is not sustained by sufficient evidence.

The assignment of the note and mortgage was in writing and was not questioned by either party to the suit, nor was there any dispute about the fact that the bank had

7. credited the amount of the note and the accrued interest on the debt of the husband of appellee and at the same time had taken his note for the balance due from him, after deducting from the whole amount of his debt the proceeds of the note. The evidence also shows a demand on appellant by appellee, on June 5, 1911, through her attorneys, for \$437.48, the amount of the principal of the note, and seven per cent interest thereon from February 8, 1910,

the date of the note. It is true the bank offered evidence to show that only one installment of interest had been paid and that the principal of the note for \$400 had not been paid at the time of the trial. But it also proved by its officer that the note belonged to it and was at that time a part of the assets of the bank. Appellant obtained the benefit of the proceeds of the note and mortgage and claimed to have done so by authority from appellee. The question of the right of appellant to apply said proceeds in this manner was the controlling question in the controversy, and on the facts of the case it was not material whether the obligor of the note had actually paid the same to appellant or not. From the foregoing facts, the jury was warranted in drawing the inference that the note and mortgage were sold to the bank with directions as to the application of the proceeds of the sale as alleged in the complaint. By its verdict, the jury found for appellee as to every material averment of the complaint. On the question of appellant's right to apply the proceeds of the note and mortgage as it admitted it had done, there is a conflict of evidence. The jury had evidence from which it might find as it did and there being some evidence to support the verdict, this court will not disturb the judgment on the weight of the evidence.

Objections are urged to several of the instructions given by the court. The instructions are subject to some criticism and cannot be commended as accurate statements of
8. the law. Some of the inaccuracies were against appellee rather than appellant. On the whole record, after a careful reading of the evidence, we are convinced that the intervening errors are not of such a character as to require a reversal of the judgment. There is little, if any, probability that a new trial would produce a different result. As already indicated, the principal controverted question at issue was that of the right of appellant to apply the proceeds of the \$400 note to the payment of the debt of appellee's husband. The record shows that this and other

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issues were fully and fairly tried out on the merits of the controversy and that substantial justice between the parties has been done by the lower court. Where this is the case, it is the duty of this court to affirm the judgment. §§407, 700 Burns 1908, §§398, 658 R. S. 1881; *Domestic Block Coal Co. v. DeArme*y (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; *Chicago, etc., R. Co. v. Murphy* (1913), 54 Ind. App. 531, 101 N. E. 829; *Grand Rapids, etc., R. Co. v. King* (1908), 41 Ind. App. 701, 709, 83 N. E. 778; *Indianapolis St. R. Co. v. Schomberg* (1905), 164 Ind. 111, 114, 72 N. E. 1041; *St. Clair v. Princeton Coal, etc., Co.* (1912), 50 Ind. App. 269, 98 N. E. 197.

Judgment affirmed.

NOTE.—Reported in 104 N. E. 604. As to conversion sufficient to maintain trover, see 24 Am. St. 795. See, also, under (1) 2 Cyc. 1014; (2) 38 Cyc. 2025; (3) 38 Cyc. 2071; (4) 38 Cyc. 2032, 2071; (5) 8 Cyc. 138; (6) 3 Cyc. 388; (7) 38 Cyc. 2086; (8) 3 Cyc. 443.

WICKERSHAM v. MCGAUGHEY.

[No. 8,279. Filed March 31, 1914.]

1. **APPEAL.—Assignment of Errors.—Briefs.**—The assignment of errors is the complaint on appeal, and such errors as are relied on for reversal must be set out in appellant's brief in order to present any question thereon, hence where there is a failure to comply with the rules of court in this respect, an affirmance of the judgment is required. p. 670.

From Superior Court of Marion County (84,088); *Charles J. Orbison*, Judge.

Action by Abbie McGaughey against Nannie Wickersham and another. From a judgment for plaintiff, the defendant named appeals. *Affirmed.*

Charles B. Clarke and *Walter C. Clarke*, for appellant.

Emrick & Deupree, for appellee.

FELT, J.—Suit by appellee McGaughey against appellee Gambrel and appellant Wickersham, copartners, for dissolu-

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tion of a partnership and an accounting. Counsel for
1. appellee McGaughey insist that no question is presented by appellant's brief, for the reason that she has not set out therein the errors relied on for the reversal, by copying them in the briefs or by giving the substance thereof, as required by the rules of this and the Supreme Court. Our examination of appellant's brief compels us to sustain appellee McGaughey's contention in every particular as to the assignment of errors. In fact the briefs contain no reference or suggestion of any kind indicating that there is any assignment of errors. It has been frequently held by this and the Supreme Court that the assignment of errors is the complaint on appeal and that the briefs must set out the errors relied on for reversal and show a good faith effort to comply with the rules of the court, in order to present any question for decision. *Griffith v. Felts* (1913), 52 Ind. App. 268, 99 N. E. 432; *King v. State, ex rel.* (1911), 47 Ind. App. 595, 597, 93 N. E. 1082; *Chicago, etc., R. Co. v. Newkirk* (1911), 48 Ind. App. 349, 350, 93 N. E. 860; *Collins v. Wilber* (1910), 173 Ind. 361, 363, 89 N. E. 372; *Chicago Terminal, etc., R. Co. v. Walton* (1905), 165 Ind. 253, 94 N. E. 1090; *Barnett v. Bromley Mfg. Co.* (1898), 149 Ind. 606, 49 N. E. 160. No error is presented by the briefs.

Judgment affirmed.

NOTE.—Reported in 104 N. E. 770. See, also, 2 Cyc. 989, 1014.

FRY v. SEELY ET AL.

[No. 8.260. Filed April 1, 1914.]

1. MUNICIPAL CORPORATIONS.—*Powers of Common Council.—Ordinances and Resolutions.—Statutes.*—The provision of §52 of the Cities and Towns Act (Acts 1905 p. 219, §8654 Burns 1908) that all ordinances, orders and resolutions must be signed by the mayor or passed over his veto by a two-thirds vote of the members-elect of the common council, as well as that of subd. 9, §80, of the same act (§9682 Burns 1908) making it the duty of the mayor to approve or disapprove every ordinance or resolution of

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the common council, refers only to ordinances, orders, resolutions and motions for the government of the city, for the control of its property and finances, and for the appropriation of money, which the common council, by the first part of said §52 is authorized to pass. p. 674.

2. **MUNICIPAL CORPORATIONS.—Public Improvements.—Adoption of Resolutions.—Approval by Mayor.—Statutes.**—Under §107 of the Cities and Towns Act (Acts 1907 p. 412), providing that resolutions for street improvements shall be adopted by the board of public works, it is not contemplated that an improvement resolution shall be approved by the signature of the mayor in order to become operative, but exclusive jurisdiction in such matter, except in the event of remonstrance, is vested in the board of public works; and since §265 of said act (§8959 Burns 1908) provides that in cities of the fifth class the duties of the board of public works shall be performed by the common council, an improvement resolution adopted by such common council occupies the same legal status as a similar resolution by a board of public works, and hence need not be signed by the mayor to be operative. p. 674.

From Hancock Circuit Court; *Robert L. Mason*, Judge.

Action by Marshall A. Fry against Mary E. Seely and others. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Tindall & Tindall, for appellant.

Will A. Yarling, Cook & Cook and *A. E. Lisher*, for appellees.

LAIRY, C. J.—Appellant brought this action in the Hancock Circuit Court to enforce assessments against certain lots located in the city of Greenfield, Indiana, for the improvement of a street of such city. The proceeding for the street improvement in question was begun and carried forward to completion under the act of 1905 (Acts 1905 p. 219) and the amendment thereto passed in 1909 (Acts 1909 p. 412) relating to improvement of streets by cities. Appellant was the contractor and filed the complaint as such. The issues were formed by a general denial to the complaint and by a special answer and a reply thereto in general denial. The court made and filed a special finding of facts and pronounced its

conclusions of law thereon in favor of the appellees and rendered judgment accordingly. The errors assigned are that the court erred in overruling appellant's demurrer to the affirmative answer and erred in its conclusions of law. The two errors assigned present the same question in different forms.

It appears from the special answer and also from the special finding of facts that on August 4, 1909, the common council of the city of Greenfield passed a resolution for the improvement upon which the assessment sought to be collected is based. It also appears that such resolution was never at any time approved or vetoed by the mayor of Greenfield, and that the common council of that city did not at any time pass such resolution over the veto of the mayor by a vote of two-thirds of the members elect of that body or that it did not repass such ordinance by such two-thirds vote on account of the failure of the mayor to approve it.

The legislature of 1905 passed a general act concerning municipal corporations, Acts 1905 p. 219. Section 52 of this act provides: "The common council of every city shall have power to pass all ordinances, orders, resolutions and motions for the government of such city, for the control of its property and finances and for the appropriation of money. * * * No ordinance, order or resolution of the council shall become a law, or operative until it has been signed by the presiding officer thereof, and approved in writing by the mayor, or passed over his veto, as hereinafter provided, and, whenever necessary, promulgated according to law. * * * Every ordinance, order or resolution of the common council shall, immediately upon its passage, enrollment, attestation and signature by the clerk and presiding officer, be presented by the city clerk to the mayor, and a record of the time of such presentation made by the clerk. If the mayor approve such ordinance, order or resolution, he shall enter his approval thereon and sign the same, and the ordinance, order or resolution shall become a law. If he do not approve the

ordinance, order or resolution he shall return it to the clerk, with his objections in writing, within ten days after receiving it and the clerk shall present the same to the common council at its next meeting. If the mayor fail to discharge his duty by approving or disapproving such ordinance, order or resolution within the time named, such failure shall be deemed a disapproval; and in all cases of disapproval by the mayor such ordinance, order or resolution shall not become a law, unless at its next regular or special meeting after the time named for the mayor's action, the council shall again pass the same by a two-thirds vote of all the members-elect." §8654 Burns 1908, Acts 1905 p. 219, §52. Section 80 of the same act contains the following provision in reference to the duties of mayors: "It shall be the duty of the mayor: * * * To approve or disapprove, in writing, within ten days after receiving the same, every ordinance or resolution of the common council; and he shall transmit to such council within such time a message, announcing such approval or veto. In case of a veto he shall state in writing his reason therefor, and such resolution or ordinance shall not become operative unless the same is passed over such veto, by a two-thirds vote of the common council." §8682 Burns 1908, Acts 1905 p. 219, §80. Upon these sections of the act, appellees base their contention that, by reason of the failure of the mayor to approve the resolution for the street improvement, such resolution never became operative and that the common council never obtained jurisdiction to make the improvement; that the whole proceeding was void and that no valid assessment against property could be made thereunder. This is the only question presented or argued, and the decision of this case depends entirely upon the construction which is to be given to these sections of the act when construed in connection with other sections of the same act relating to the improvement of public streets.

In the first first place it will be noticed that §52 (§8654

Burns 1908, *supra*) empowers the common council to pass ordinances, orders, resolutions and motions for the

1. government of the city, for the control of its property and finances and for the appropriation of money. The court is of the opinion that the subsequent provision of this section which requires that all ordinances, orders and resolutions must be signed by the mayor or passed over his veto by a two-thirds vote of the members-elect of the common council, refers only to ordinances, orders, resolutions and motions for the government of the city, for the control of its property and finances and for the appropriation of money. Subdivision 9 of §80 (§8682 Burns 1908, *supra*), by which it is made the duty of the mayor to approve or disapprove every ordinance or resolution of the common council within ten days after receiving the same, must be held to refer also to such ordinances and resolutions as §52 of the act empowers the common council to pass.

The conclusion we have reached is strengthened by a consideration of other sections of the act relating to the improvement of streets. Section 107 of the act (Acts

2. 1909 p. 412) provides that resolutions for street improvements shall be adopted by the board of public works. This section makes no provision for any ordinance or resolution by the common council authorizing such an improvement, except in cases where a majority of the resident freeholders on such street shall have remonstrated against the improvement within the time specified, in which case the improvement cannot be made unless specifically ordered by an ordinance passed within sixty days thereafter by a two-thirds vote of the common council and approved by the mayor. It would scarcely be contended that the act contemplates that the improvement resolution passed by the board of public works, requires the approval or the signature of the mayor in order that it may become operative. It is apparent that in cities where such boards are provided, they were intended to have complete jurisdiction over pro-

ceedings for improvements of this character, to the exclusion of the mayor and common council, except where remonstrances are filed, in which case the improvement may be ordered by an ordinance passed by a two-thirds vote of the common council and approved by the mayor. The act provides for a board of public works in all cities of the first, second, third and fourth class, and in §265 (§8959 Burns 1908, Acts 1905 p. 219), it is provided that in cities of the fifth class the duties of the board of works, in reference to street, sewer and other public improvements shall be performed by the common council of such city, and that the provisions of the act relating to such improvements in cities of the first, second, third and fourth class shall apply to cities of the fifth class.

When a city of the fifth class undertakes any street, sewer or other public improvement, the common council in respect to such improvement occupies the position and discharges the duties and functions of a board of public works. A resolution for a street improvement adopted by the common council of a city of this class occupies the same legal status and is governed by the same law as a similar resolution adopted by the board of works of a city of one of the higher classes. Such a resolution does not require the signature of the mayor to make it operative. The conclusions of law stated by the trial court are erroneous and the judgment is reversed.

As no good purpose could be subserved by a retrial of this case, the trial court is directed to restate its conclusions of law in accordance with this opinion and to render judgment accordingly.

NOTE.—Reported in 104 N. E. 774. See, also, under (1) 28 Cyc. 356; (2) 28 Cyc. 997.

Adams v. Union Nat. Sav., etc., Assn.—55 Ind. App. 676.

ADAMS v. UNION NATIONAL SAVINGS AND LOAN ' ASSOCIATION.

[No. 8,360. Filed January 7, 1913. Rehearing denied June 18, 1913. Transfer denied April 1, 1914.]

1. **BUILDING AND LOAN ASSOCIATIONS.—*Repayment of Loan.—Statutes.—Public Policy.***—In view of the fact that from the time of earliest legislation on the subject of building and loan associations various statutes have provided that borrowing members could pay off their loans and withdraw their membership at any time before maturity by paying the amount due with interest, charges and fines, if any, and in view of the chief purpose for authorizing such associations, the right of a borrowing member to thus pay off his loan at any time must be deemed a part of the public policy of the State; hence any provision in the by-laws of such an association, or in the mortgage executed by a borrower whereby such borrower waives the right secured to him by §13 of the act of 1911 (Acts 1911 p. 390), to at any time repay his loan and withdraw from the association, is void as against public policy. pp. 678, 679, 682, 683.
2. **WORDS AND PHRASES.—“*Public Policy.*”**—While the character and limits of public policy are difficult of determination with any degree of exactness, the term is often defined as the policy of the law; hence the public policy of a state is the law of the state as expressed in its constitution and statute laws. p. 679.
3. **BUILDING AND LOAN ASSOCIATIONS.—*Statutes.—Construction.***—The fact that §13 of the act of 1911 (Acts 1911 p. 390), relating to the withdrawal of members from building and loan associations, provides that a nonborrowing member shall give three months' notice of his intention to withdraw, does not justify or warrant an association to obligate borrowing members to give notice of their intention to exercise the right secured to them by said section to pay off their loans and withdraw at any time, since the object in requiring notice in the case of nonborrowers is to afford the association time and opportunity to procure funds to meet the demands, and no such necessity can exist in the case of withdrawal by a borrowing member. p. 682.

From Superior Court of Marion County (86,471); *Joseph Collier*, Judge.

Action by Frederick B. Adams against the Union National Savings and Loan Association. From a judgment for defendant, the plaintiff appeals. *Reversed.*

Adams v. Union Nat. Sav., etc., Assn.—55 Ind. App. 676.

Thomas M. Honan, Attorney-General, *James E. McCullough*, *Edwin Corr* and *Thomas H. Branaman*, for appellant.
Walter Olds, for appellee.

IBACH, C. J.—This was an action brought by appellant against appellee, a building and loan association, to secure the cancelation and release of a note and mortgage executed by him, he having previously tendered the amount thereof to appellee. Appellee filed its demurrer to the complaint for want of facts. The demurrer was sustained, to which ruling appellant excepted, and refusing to plead further, judgment was rendered against him for costs. The action of the trial court in sustaining the demurrer to the complaint is the only error assigned.

The note and mortgage which are made a part of the complaint are in the ordinary form made use of by building and loan associations doing business in this State, except that the mortgage contains the following clause, “the mortgagors further agree that in consideration that no fines shall be assessed against the said borrower for nonpayment of dues, interest or premiums until they shall have been delinquent therefor for three successive months, they will and do hereby waive the statutory right to repay the said loan at any time, and agree that the debt secured hereby can only be repaid in advance of its maturity by the mortgagors giving said mortgagee written notice of their desire to do so six months in advance of the time of such proposed repayment, during which time regular monthly payments of dues, interest and premium shall be made, and that a failure to repay said debt within thirty days after the expiration of said six months shall operate as a waiver of such notice, and require the giving of a new six months’ notice before repayment of said debt can be made.” This provision as to waiver appears not only in the mortgage, but it is required by the by-laws of the association and is stipulated in the borrower’s application for a loan. These instruments are also made a part of the complaint.

It is conceded by appellee that a borrowing member of a building and loan association, irrespective of the provision of the by-laws and the application for loan above referred to and independent of a similar provision in the mortgage, may, under the statute, repay his loan with interest, fines, and other charges, if any, at any time before maturity, and at the same time withdraw from the association, but appellee insists that this right has been effectually waived in the manner above set forth. Appellant contends that whatever is contained in the by-laws or other instrument of appellee executed at the time the loan in question was procured, which attempts to prevent the borrower from paying off his loan at any time before maturity, is void, because it is directly contrary to the statute and consequently is against public policy, and therefore any attempt to waive this positive statutory right as to repayment can not be upheld. The statute referred to and relied upon by appellant is the following: "Any borrower may repay his loan at any time, and may at the same time withdraw from the association, and for that purpose he shall pay to the association the full face amount of the principal of his loan with all interest, fines, and other charges accrued thereon under the by-laws or the terms of any note, mortgage, or other evidence of indebtedness given for said loan, deducting therefrom the withdrawal value of his stock pledged to secure such loan, as provided in the case of withdrawals of unpledged stock, and deducting also, in case the full amount of premium was paid in advance, so much of the premium paid by him on his loan as shall bear the same proportion to the whole premium by him paid, as the unexpired term for which the loan was made bears to the whole time for which the loan was made; and on such payment being made, the stock held by such person upon which his loan was made, shall be surrendered to the association and canceled, and thereupon the association shall deliver to such borrower his note, or bond and mortgage, or other evidence

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of such loan, and shall also enter of record a full satisfaction of such mortgage.” Acts 1911 p. 390, §13. Similar provisions are to be found in the various acts of the legislature of the State relating to building and loan associations from the time of the earliest legislation upon the subject to the present time, and by all these various enactments of the legislature a borrowing member of a building and loan association has been given the right to pay off his loan by paying the amount due with interest, charges and fines, if any, at any time before maturity, and at the same time withdraw from the association. §3413 R. S. 1881, Acts 1881 (s. s.) p. 90; §4113 Burns 1908, Acts 1885 p. 81. The important question therefore, is, whether the by-laws of appellee association and the stipulations contained in its contracts with its borrowing members which attempt to annul their rights granted by statute, to repay a loan at any time before its maturity, are contrary to the public policy of the State, and therefore void as provisions of the contract between appel-

lant and appellee. Mr. Story in his work on contracts, after considering a great number of authorities announces the following: “Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free from definition in the same manner as fraud. This rule may, however, be safely laid down, That whenever any contract conflicts with the morals of the times and contravenes any established interest of society, it is void as being against public policy.” Story, Contracts (5th ed.) §675. Mr. Greenwood in his work on public policy says, “By ‘public policy’ is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation

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to the administration of the law. The strength of every contract lies in the power of the promisee to appeal to the courts of public justice for redress for its violation. The administration of justice is maintained at the public expense. The courts will never, therefore, recognize any transaction which, in its object, operation or tendency is calculated to be prejudicial to the public welfare." Greenhood, Public Policy 2. It is often said that public policy is the policy of the law, and when we refer to what may be termed the public policy of a state, we mean the law of the state as expressed in its constitution and statute laws.

The section of the statute last cited above, giving a positive right to appellant to pay his loan at any time and withdraw his stock, is a plain and definite expression of the legislature upon that subject, there is nothing uncertain about its provisions, and when construed in the light of all previous legislation upon the same subject, there can be no doubt as to what the legislature intended when the present law was enacted. The evident purpose of the law was to enable a borrowing member of a building and loan association to pay off his loan and withdraw his stock at any time before maturity when he was prepared to pay the amount due the association, and a nonborrower to withdraw his stock upon three months' notice. Such a statute ought not to be permitted to become valueless by any by-law of such association, or by any contract which it might exact. The statute in such case must be held to control, and not the contract, whatever its provisions may be. In other words the contract and by-laws of the association must be molded to conform to the statute and the directors of the association have no power to adopt any by-laws which would be in conflict with the statutes of the State, or that would have the effect of nullifying the same. *Latimer v. Equitable Loan, etc., Co.* (1897), 81 Fed. 776, and cases there cited.

From a consideration of the various statutes passed by our State legislature affecting building and loan associations

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it is manifest that the object and purpose in giving life and existence to such an association is to furnish to a large class of the citizens of the State an opportunity to build and procure homes who in all probability might not otherwise be able to do so, the underlying idea being to enable the poorer and less fortunate ones who can not borrow money by the usual and ordinary methods for the purpose of providing homes, to do so by the application of weekly or monthly payments out of their wages, and thereby encourage in them ideas of thrift and economy. These statutes together with many others enacted upon kindred subjects and the decisions of this and the Supreme Court construing the same, plainly indicate the policy of this State to be against the enforcement of such a contract as is insisted upon by the appellee in this case. Likewise it is well understood that a debtor can not be deprived of the benefit of usury laws because he may have voluntarily contracted to pay usurious interest, also that the equity of redemption of a mortgagor in real estate can not be waived by any provision of the mortgage or by the terms of any contract made contemporaneously therewith. Also the right to claim the exemption allowed by statute can not be waived. These are all doctrines which have been sustained consistently by the courts of this as well as many other jurisdictions because they are essential to the protection of the debtor class, who, under pressing necessities will often enter into unfavorable contracts, from which they should be relieved at the first possible opportunity. Consequently, the statute now under consideration was passed for the evident purpose of permitting the borrowing member to pay his debt at any time without notice. It would therefore seem that any plan adopted by such association to prevent the payment of loans at any time would not only be in direct conflict with the statute, but against the whole theory and policy of the law. We therefore hold that the stipulation of the by-laws and the instruments signed by appellant at the time he procured

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his loan, which aim to prevent him from paying such loan at any time, are in clear contravention of public policy, and therefore null and void.

The fact that the statute requires a nonborrowing member, in order that he may withdraw from the association and receive the amount due him as an investor, to give a

3. three month's notice of his withdrawal, furnishes no support to the contention of appellee, for the provision for such notice in the case of a nonborrowing member is to allow the association, when required to pay back the money which such member has paid in, ample time to obtain sufficient funds to meet such demand, but in the case of the borrower, the money is to be paid by him into the association, and there can be no sufficient reason for holding a notice necessary in such a case.

We are mindful of the principle that one may waive statutory rights in certain instances where such waiver would not be against public policy. But here we have an

1. association which is entirely the creature of statute, which owes its existence to statute, and can do nothing save as authorized by the statute which created its rights, and in conformity therewith. To hold that such an association might, by contracts with its members, in any way nullify the provisions of the statute under which it exists, would be to open the way for wholesale disregard of legislative enactments for the public good, by the simple expedient of agreements to waive statutory rights, made at the behest of one party who occupies a much stronger position than the other party at the time the contract is made.

The court erred in sustaining the demurrer to appellant's complaint, and for this error the judgment is reversed.

ON PETITION FOR REHEARING.

IBACH, J.—Counsel for appellee in support of its petition for a rehearing has filed a very able and exhaustive brief, which we have given careful consideration. The ques-

1. tion which it most sharply emphasizes and urges, relates to that portion of the opinion wherein it was held that the provisions of the by-laws of appellee and of the various instruments signed by appellant at the time he procured his loan, which were intended to prevent him from paying his loan at any time, were null and void as against the policy of the law of this State.

In the argument, reference is made to the statute which requires six months' notice for the payment of special assessment liens after the improvement bonds have been sold, and it is urged that these cases are analogous to the present, and therefore we are wrong in holding that it is the policy of the law to permit the appellant to pay his loan "at any time", without notice, and that such a provision of our statute is one which could not be waived by the appellant at the time of contracting for his loan. We can not agree with counsel in this contention, for we observe a marked and important difference between a party whose property is assessed for a public improvement and the appellant here. In the one case, it is well understood that the statute was enacted to provide a means whereby municipalities might be able to carry out plans and obtain means with which certain improvements which tend toward the betterment of the health and comfort of their citizens and without which statute every effort to construct such public improvements would be defeated. It is a well known fact that investors would not deal in these special improvement bonds if they were required to receive at any time and in any amount the separate assessments spread against benefited property. As a general rule, the funds so invested belong to estates and individuals who require a specified and definite time fixed for payment.

Doubtless it was because this fact was so well understood that the legislature saw the necessity of providing for a fixed time during which all improvement bonds should run and a definite manner of paying the same so as to issue competitive bids at the bond sales and a sale thereof on the best possible terms to the municipalities, and consequently to the individual property owner whose property was assessed.

As to this case, a different principle is involved, and a different purpose was intended to be accomplished when the statute affecting appellant was enacted. Its purposes, we think, have been fully set forth in the original opinion, and these purposes recognized by the statutes of our State cannot be held to be dependent upon the contracting will of the individual intended to be protected thereby and the statute be thus made ineffectual, but it must be upheld whenever the courts are called upon so to do. In support of this view of the case, we add the following authority, *Zumpfe v. Gentry* (1899), 153 Ind. 219, 54 N. E. 805, and cases there cited. The petition for rehearing is therefore denied.

NOTE.—Reported in 100 N. E. 389; 102 N. E. 145. As to the rights and liabilities accruing to membership in building and loan associations, see 69 Am. Dec. 150. On the question of withdrawals from building and loan associations, see 35 L. R. A. 289. As to the right to withdraw from a building and loan association, see 8 Ann. Cas. 835. See, also, under (1) 6 Cyc. 122, 129; (2) 9 Cyc. 481; 32 Cyc. 1251; (3) 6 Cyc. 130.

KINGAN & COMPANY, LIMITED, v. GLEASON.

[No. 7,980. Filed May 29, 1913. Rehearing denied February 27, 1914. Transfer denied April 1, 1914.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Cogwheels.—Duty to Guard.*—Where cogwheels are so located and protected by other parts of the machine that injury to a workman while in the discharge of his ordinary duties is not, in view of the danger of accident and mischance usually incident to the employment, reasonably to be anticipated, they are properly guarded within the meaning of the statute (§8029 Burns 1908, Acts 1899 p. 231, §9). p. 687.

2. MASTER AND SERVANT.—*Injuries to Servant.—Cogwheels.—Guards.—Masterial Duty.*—Where a cog gearing is located in close proximity to a portion of the machine which requires oiling, it is the master's duty to provide such guards as will afford protection to the servant, not only while he is engaged in operating the machine, but while he is engaged in oiling it as a part of his employment; hence where it was shown that the cogwheels on which plaintiff was injured while oiling the machine were at the back and lower part of the machine and near the oil tube, the court cannot say that the defendant had discharged its duty with respect to guarding such cogs, although they were to some extent guarded by other parts of the machine. p. 688.
3. MASTER AND SERVANT.—*Injuries to Servant.—Verdict.—Answers to Interrogatories.*—In a servant's action for injuries by coming in contact with cogwheels alleged not to have been guarded, answers by the jury to interrogatories from which the court cannot say that the defendant had discharged its duty with respect to guarding such wheels are not in conflict with a general verdict for plaintiff. p. 688.
4. MASTER AND SERVANT.—*Injuries to Servant.—Choice of Ways.—Assumed Risk.—Contributory Negligence.*—The rule that where two ways of performing a work are open to a servant, one of which is dangerous and the other safe, or one of which is attended with greater danger than the other, a servant, who, knowing the facts and realizing the danger, voluntarily chooses the more dangerous course, will be denied a recovery for any resulting injury, is applicable in all its strictness, in cases in which the doctrine of assumed risk is recognized; but can be sustained only upon the theory of contributory negligence, in cases where the doctrine of assumed risk does not obtain. p. 689.
5. NEGLIGENCE.—*Contributory Negligence.*—Contributory negligence consists of such conduct on the part of plaintiff, characterized by the want of such care as a person of ordinary prudence would exercise under like circumstances, which directly contributes to produce the injury of which he complains. p. 689.
6. MASTER AND SERVANT.—*Injuries to Servant.—Choice of Ways.—Contributory Negligence.*—The court may say as a matter of law that a servant was guilty of contributory negligence in the choice of a way in which to perform his work, where the only reasonable conclusion that can be derived from the facts is that the danger incident to the mode adopted was open and obvious and of a character so imminent and threatening that no man of ordinary prudence would have taken the chances of encountering it; otherwise the question of contributory negligence in such case is for the jury. p. 690.
7. MASTER AND SERVANT.—*Injuries to Servant.—Contributory Neg-*

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ligence.—Where plaintiff, who was injured by cogwheels while he was attempting to oil the machine, started to stop the machine for the purpose of oiling it and was directed by his foreman to oil the machine running, the verdict for plaintiff cannot be disturbed on the theory that plaintiff was guilty of contributory negligence in oiling it while in operation. p. 690.

8. **TRIAL.—Verdict.—Answers to Interrogatories.**—Answers to interrogatories will not overthrow the general verdict if they can be reconciled therewith by any evidence admissible within the issues. p. 691.

9. **MASTER AND SERVANT.—Injuries to Servant.—Unguarded Cogwheels.—Assumed Risk.—Contributory Negligence.**—Where the negligence charged against defendant consists in a failure to discharge a statutory duty the doctrine of assumed risk does not apply, so that where defendant failed to properly guard certain cogwheels in compliance with §8029 Burns 1908, Acts 1899 p. 231, §9, plaintiff could recover for injuries to his hand in being caught in such cogs notwithstanding he was at the time performing his work in the more hazardous of two ways open to him, unless he was guilty of a want of ordinary care in encountering the known danger, and the verdict in his favor could not be disturbed on the theory of contributory negligence where the evidence upon that point was such that opposite inferences could reasonably be drawn therefrom. p. 691.

10. **MASTER AND SERVANT.—Injuries to Servant.—Unguarded Cogwheels.—Instructions.**—An instruction that it was defendant's duty to guard the cogwheels of a machine by which plaintiff was injured, if it was practical and possible to do so, was not open to the objection that it required guards even though the wheels were protected by the machinery itself, where such referred to other instructions in which the jury was told that if other parts of the machine afforded a reasonable safeguard they were sufficiently guarded. p. 692.

11. **APPEAL.—Review.—Harmless Error.—Instructions.**—Defendant, in an action for injuries to a servant by reason of unguarded cogs, was not harmed by an instruction which failed to state that as a prerequisite to a verdict for plaintiff the unguarded condition of the cogs must have been the proximate cause of the injury, even if such omission was error where the evidence was such that the jury could have reached no other result under a proper instruction. p. 693.

12. **APPEAL.—Review.—Instructions.—Damages.**—In the absence of any evidence in the record which might have improperly influenced the jury in estimating the damages, an instruction directing it to consider all the facts and circumstances in the case in estimating the damages, though objectionable in not limiting the con-

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sideration to the facts and circumstances bearing on the question of damages, could not have affected the amount of the verdict and was harmless. p. 693.

13. APPEAL.—*Review.—Refusal of Instructions.*—There was no error in the refusal of instructions fully covered by instructions given. p. 694.

From Superior Court of Marion County (79,247); *Clarence E. Weir*, Judge.

Action by Albert Gleason against Kingan & Company, Limited. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

W. H. H. Miller, C. C. Shirley, S. D. Miller and W. H. Thompson, for appellant.

Doan & Mathews, for appellee.

LAIRY, J.—Appellee was an employe of appellant at the time he received the injury for which he sues, and was engaged in operating a machine known as a hoop stretcher. While he was engaged in oiling this machine, his hand was caught between two cogwheels and injured. It is the theory of the complaint that the oiling of the machine was a part of the work appellee was required to perform, and that the cogwheels which caused his injury were so located as to expose him to danger unless they were properly guarded. The negligence charged against the appellant is the failure to properly guard these wheels. A jury trial resulted in a verdict and judgment in favor of appellee. With the general verdict, the jury returned answers to a number of interrogatories. The court overruled appellant's motion for a judgment in its favor on these answers notwithstanding the general verdict, and this ruling presents the first question for consideration.

The first claim on behalf of appellant is that the answers to interrogatories show that it was not negligent in failing

to guard the cogwheels in question for the reason that,

1. on account of their location and the structure of the framework and of other parts of the machine, they

were already properly guarded. If the wheels in question were so located and so protected by other parts of the machine, that the master, in the exercise of ordinary care and prudence, could not have anticipated or foreseen that any injury would probably result to any workman while in the discharge of his ordinary duties in view of the danger of accident and mischance usually incident to such employment, then it could be said that they were properly guarded within the meaning of the statute. §8029 Burns 1908, Acts 1899 p. 231, §9. *Vigo Cooperage Co. v. Kennedy* (1908), 42 Ind. App. 433, 85 N. E. 986; *Evansville Hoop, etc., Co. v. Bailey* (1909), 43 Ind. App. 153, 84 N. E. 549. As shown by

2. the answers to interrogatories the two cogwheels between which appellee's hand was caught and injured were at the back and lower part of the machine. The large wheel on the main shaft was about fifteen inches in diameter and the small wheel into which it was geared was about four and one-half inches in diameter and was located above the large wheel. The large wheel was about two and three-quarters inches from the north frame or casing of the machine which was about four feet high, twelve inches wide at the top and eighteen at the bottom. There was a small oil tube on the shaft between the large wheel and the north casing. At the time appellee was injured, he was attempting to take a plug from the oil tube between the large wheel and the north casing, while the cogwheels were in motion. The machine was operated by electricity and the large wheel revolved at the rate of about thirty-three revolutions a minute. It thus appears that the cog gearing was located in close proximity to a portion of the machine which required oiling. It was the duty of appellant to provide such guards as would afford protection to appellee not only while he was engaged in operating the machine but also while he was engaged in oiling it as a part of his employment.

3. From the answers to interrogatories, we are not able to say that appellant discharged its duty in this re-

spect. By the general verdict, the jury found that appellant was negligent and, in this respect the answers to the interrogatories are not inconsistent therewith.

On behalf of appellant, it is also claimed that the facts found by the answers to the interrogatories show that appellee, as a matter of law was guilty of contributory

4. negligence. The facts thus found show that by shifting the belt to a loose pulley, appellee could have stopped the machine before attempting to oil it, and that, if this had been done, the machine could have been oiled with perfect safety and the injury would not have occurred. It has been frequently stated as a general rule that where two ways of performing a work are open to a servant, one of which is dangerous and the other safe, or one of which is attended with greater danger than the other, and where the servant knowing the facts and realizing the danger, voluntarily adopts the more dangerous course, he will be denied a recovery as against the master for any resulting injury. This rule applies in all its strictness to cases in which the doctrine of assumption of risk is recognized, for it has been long settled that a servant assumes the risk of injury from all known and appreciated dangers incident to his employment, even though they are occasioned by the negligence of the master. *Brazil Block Coal Co. v. Hoodlet* (1891), 129 Ind. 327, 27 N. E. 741; *Jenney Electric Mfg. Co. v. Flannery* (1913), 53 Ind. App. 397, 98 N. E. 424; *Richardson v. Carbon Hill Coal Co.* (1893), 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338. In cases such as the one before the court, the doctrine of assumption of risk does not obtain; and, if the rule stated is to be applied in such a case, it must be sustained upon the principle of contributory negligence. Contributory negligence consists of conduct on the part

5. of plaintiff characterized by a want of due care, which conduct directly contributes to produce the injury of which he complains. By due care is meant such care as a

person of ordinary prudence would exercise under like circumstances. Whether a person was in the exercise of due care under the circumstances is generally a question of fact for the jury. *Evansville, etc., R. Co. v. Berndt* (1909), 172 Ind. 697, 88 N. E. 612; *Cleveland, etc., R. Co. v. Hadley* (1908), 170 Ind. 204, 82 N. E. 1025, 84 N. E. 14, 16 L. R. A. (N. S.) 527, 16 Ann. Cas. 1.

In determining whether a servant was guilty of contributory negligence by selecting a way known to be dangerous where a safe way or a safer way of doing the work

6. was open to him, it is proper to consider all the surrounding facts and circumstances. If the danger incident to the mode adopted was open and obvious, and of a character so imminent and threatening that no man of ordinary prudence would have taken the chances of encountering it; and, if the facts are such that no reasonable mind could reach any other conclusion, then the question is one of law and the court may say that the servant was guilty of contributory negligence in adopting such dangerous course. On the other hand, if the facts are of such a character that a person of ordinary prudence might have reasonably believed that the danger could be safely encountered by the exercise of proper caution, or where the facts are such that reasonable minds might differ in this regard, the question is one for the jury. *Jenney Electric Mfg. Co. v.*

Flannery, supra, and cases there cited. The plain-

7. tiff in this case testified that on the day he commenced work on the machine the foreman came to him and inquired if he had oiled it. Upon receiving a negative answer, the foreman directed plaintiff to oil the machine, and when he reached for the lever to throw the machine out of gear, the foreman said: "Never mind doing that, young man, it takes too much time; oil the machine running." In view of this evidence, the jury may have properly found that appellee was not guilty of contributory negligence in attempting to oil the machine while it was running, even

though it would have been safer to have stopped it. It is well settled that answers to interrogatories will not
8. overthrow the general verdict if they can be reconciled therewith by any evidence admissible within the issues. *Union Traction Co. v. Barnett* (1903), 31 Ind. App. 467, 67 N. E. 205; *Chicago, etc., R. Co. v. Leachman* (1903), 161 Ind. 512, 69 N. E. 253. It is also shown by the answers to interrogatories that plaintiff had a glove on the hand that was injured and that the glove caught in the cogs, but the answers further show that the injury was not due to the presence of the glove. The facts found by these answers do not show that appellee was guilty of contributory negligence as a matter of law. The court committed no error in overruling appellant's motion for judgment in its favor on the answers to interrogatories.

Appellant's next contention is that the evidence is not sufficient to sustain the verdict. It is insisted that the undisputed evidence shows a state of facts from which the court should say as a matter of law that appellee was guilty of contributory negligence. The undisputed evidence shows that the cogwheels which caused the injury were in plain view of appellee, and that the danger incident to an attempt to oil the adjacent part of the machine while the machine was in motion was open and obvious, and that he attempted to remove the plug from the oil tube on the shaft with full knowledge of the danger. The doctrine of assump-

9. tion of risk precludes a recovery by a servant in cases where his knowledge of the danger which caused his injury, and of the means of avoiding such danger, were equal to those of the master; but in cases where the doctrine of assumption of risk is not recognized, the plaintiff may recover unless he is guilty of a want of ordinary care in encountering the known danger. *Muren Coal, etc., Co. v. Copeland* (1910), 46 Ind. App. 230, 90 N. E. 489, 91 N. E. 508; *Rase v. Minneapolis, etc., R. Co.* (1909), 107 Minn. 260, 120 N. W. 360, 21 L. R. A. (N. S.) 138, and cases there

cited. The issue of assumption of risk was not in this case, for the reason that the negligence charged against appellant consists in a failure to discharge a duty imposed by statute. *Balzer v. Waring* (1911), 176 Ind. 585, 95 N. E. 257; *Diamond Block Coal Co. v. Cuthbertson* (1906), 166 Ind. 290, 76 N. E. 1060; *Bcssler v. Laughlin* (1907), 168 Ind. 38, 79 N. E. 1033; *Paul Mfg. Co. v. Racine* (1909), 43 Ind. App. 695, 88 N. E. 529. Upon the issue of contributory negligence the burden rested with the appellant and the verdict is in favor of appellee. To justify this court in setting aside the verdict on this issue, the undisputed evidence must disclose a state of facts from which no reasonable inference can be drawn, other than that the appellee was guilty of contributory negligence. If, from the facts proven, reasonable minds might draw opposite inferences, the question is one for the jury, and the conclusion reached by it can not be disturbed. Under the evidence in this case, we can not say that the jury was not warranted in reaching the conclusion that appellee exercised due care under the circumstances.

By instruction No. 9 given by the court of its own motion, the jury was told that, if under the other instructions given, it found that it was practical and possible for appellant to have guarded the cogs at the time appellee was injured, then it was its duty under such circumstances to guard them. The objection urged against this instruction is that it imposed upon appellant the duty of guarding the cogs in question if it was practical and possible to do so, even though they were already sufficiently guarded by the structure of the machine. This instruction refers to other instructions given, and by other instructions the jury was explicitly told that, if it found from the evidence that the other parts of the machine by reason of the manner of its construction afforded a reasonably safe guard for the cogs in question, then it might find that the cogs were sufficiently guarded at the time of the injury to ap-

pellee. Considering the instructions as a whole, we do not think that the jury could have been misled on this point.

The court is of the opinion that instruction No. 16 is not open to the objection urged against it; but even though it

may be said that it is defective in failing to require
11. the jury to find, as a prerequisite to a verdict for the plaintiff that the unguarded condition of the cogs was the proximate cause of the injury, we do not regard the defect as fatal. The undisputed evidence in this case shows that the unguarded condition of the cogwheels was the proximate cause of appellee's injury, and that there was no independent intervening cause. As the jury could have reached no other result under a proper instruction, the error, if any, was harmless. *Indianapolis Traction, etc., Co. v. Menze* (1909), 173 Ind. 31, 88 N. E. 929, 89 N. E. 378; *Indianapolis Traction, etc., Co. v. Formes* (1907), 40 Ind. App. 202, 80 N. E. 872.

Instruction No. 17 relates to the measure of plaintiff's damages in the event of recovery. The attention of the

jury is called to the various elements of damage that
12. it may properly consider in fixing the amount to be awarded, and the instruction concludes with the language following: "and from all the facts and circumstances in the case as shown by the evidence, determine upon such sum as will fairly compensate plaintiff for the injuries received, not however, exceeding the amount named in the complaint." Appellant objects to the language quoted, upon the grounds that it authorizes the jury to consider all the facts and circumstances of the case in estimating damages and that it does not limit the jury in assessing damages to a consideration of facts and circumstances in evidence bearing upon the question of damages. Appellant's contention seems to be sustained by the cases cited in its support. *Monongahela River, etc., Co. v. Hardsaw* (1907), 169 Ind. 147, 81 N. E. 492; *City of Delphi v. Lowery* (1881), 74 Ind. 520, 39 Am. Rep. 98; *Broadstreet v. Hall* (1904),

32 Ind. App. 122, 69 N. E. 415; *Knoefel v. Adkins* (1907), 40 Ind. App. 428, 81 N. E. 600. A jury is presumed to be composed of men of ordinary understanding and intelligence; and, if this presumption is indulged, we think that it is not going too far to say that such a jury would not, ordinarily, be misled by an instruction such as the one under consideration. We think that an instruction directing the jury to consider all the facts and circumstances in the case in estimating the damages to be awarded would be understood to mean that they should consider all the facts and circumstances bearing upon the question of damages, unless the evidence discloses some exceptional facts or circumstances which would probably mislead the jury in estimating the damages. In each of the cases cited, wherein the giving of a similar instruction was held to be reversible error, there was evidence as to facts and circumstances which, from their nature, might have influenced the jury improperly in estimating the damage. These facts and circumstances are, in each case, carefully pointed out by the court, and their injurious tendency is emphasized as having an important influence on the conclusion reached. We have examined the record in this case and we find no evidence of any fact or circumstance which would have a tendency to induce the jury to increase the amount of damages, through passion, prejudice, undue pity, or from which it might have been led to impose punitive damages. In view of the evidence in this case, we can not think that the form of this instruction had any effect upon the amount of damages awarded.

It is further asserted that the court erred in refusing to give certain instructions tendered and requested by appellant. We have examined these instructions and have

13. reached the conclusion that instructions Nos. 10, 11 and 12 were properly refused because they do not contain an accurate statement of the law applicable to the

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facts proven. The other instructions tendered seem to have been fully covered by instructions given.

Judgment affirmed.

NOTE.—Reported in 101 N. E. 1027. As to master's duty to guard or enclose dangerous machinery, see 98 Am. St. 299. Upon employer's right of action for employer's violation of statutory duty as to guards about machinery, see 9 L. R. A. (N. S.) 381. As to what is comprehended in expression "machinery of every description" in statutes imposing duty on master as to placing guards, see 30 L. R. A. (N. S.) 36. For common practice as the measure of master's duty to guard machinery, see 16 L. R. A. (N. S.) 140. As to assumption of obvious risks of hazardous employment, see 1 L. R. A. (N. S.) 272. As to assumption of risk of defective tool machine, or appliance, where the defect is obvious, but its importance not appreciated, see 13 L. R. A. (N. S.) 692. As to contributory negligence of employe in obeying direct command, see 30 L. R. A. (N. S.) 441. See, also, under (1) 26 Cyc. 1133, 1134; (3) 26 Cyc. 1513; (4) 26 Cyc. 1188, 1257; (5) 29 Cyc. 505; (6) 26 Cyc. 1482; (7) 26 Cyc. 1272; (8) 38 Cyc. 1929; (9) 26 Cyc. 1180; (10) 26 Cyc. 1492, 1497; (11) 38 Cyc. 1812; (12) 38 Cyc. 1814; (13) 38 Cyc. 1711.

SMITH v. COLLINS ET AL.

[No. 7,913. Filed October 30, 1913. Rehearing denied January 27, 1914. Transfer denied April 1, 1914.]

1. JURY.—*Waiver of Right to Jury Trial. — Appeal. — Record. — Presumptions.*—Where a cause tried by the court involved issues triable by jury, and on appeal the court is unable to determine from the record whether there had been a waiver of the right of trial by jury, it will be presumed that the trial court discharged its duty and that the submission of the cause to the court for trial without the intervention of a jury was rightly done. pp. 696, 697.
2. APPEAL.—*Record.—Duty to Show Error.*—It is the duty of appellant to bring to the court a properly prepared record showing affirmatively prejudicial error. p. 697.

From Superior Court of Marion County (81,293); *Pliny W. Bartholomew*, Judge.

Action by Ella B. Smith against John P. Collins and another. From the judgment rendered, the plaintiff appeals. *Affirmed.*

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C. E. Fenstermacher, A. W. Fenstermacher and Frank L. Doudican, for appellant.

John W. Holtzman, Lewis A. Coleman, Russell T. McFall and W. Gage Hoag, for appellees.

SHEA, J.—This action was brought by appellant for the possession of certain real estate; the appointment of a receiver to collect the rents and profits of same; to have her title thereto quieted as against appellees, and to have a lease executed to her by appellee John P. Collins, alleged to have been secured by fraud, declared null and void. Various paragraphs of complaint, answer, cross-complaint and reply were filed in this case. Some of the paragraphs of complaint were dismissed; parts of the cross-complaint and answers of the various parties were dismissed. The cross-complaint of appellee John P. Collins asked the court to declare his lease to be in full force and effect, and that the lease executed by appellant to one Henry Kampman be declared second and inferior to the lease of appellee Collins. Judgment was rendered by the court that appellant was entitled to have her title quieted except as to the lease executed by her to John P. Collins without damages; that appellee John P. Collins held a valid lease on the property and was entitled to the possession of same without damages; that the receiver appointed assign the lease executed by him to Henry Kampman, to appellee John P. Collins, and be discharged.

No good purpose can be served by entering into a discussion of the effect and validity of the various bills of exceptions signed by the regular judge and the special judge who tried the cause. The essential question in this appeal is as to whether appellant was entitled in the first instance to a trial by jury. If she was entitled to a trial by jury, has she waived that right by agreeing to submit the cause to the special judge? After a jury had been called and duly empaneled, the appellees, who were defendants in the court below, dismissed certain

parts of their answers and cross-complaint. Upon some of the issues raised by the pleadings in this case, even after dismissal, we are inclined to think that appellant was entitled to a jury trial. Other issues were rightly triable by the court. There is a conflict in the facts set out in the various bills of exceptions as to whether appellant waived the right of trial by jury upon the issues, which of right she was entitled to have determined by a jury. It is

2. the duty of appellant to bring to this court a properly prepared record, showing affirmatively prejudicial error. *Vesey v. Day* (1911), 175 Ind. 406, 94 N. E. 481; *Allen v. Gavin* (1892), 130 Ind. 190, 29 N. E. 363; *Kernodle v. Gibson* (1888), 114 Ind. 451, 17 N. E. 99; *Whisler v. Lawrence* (1887), 112 Ind. 229, 13 N. E. 576; Elliott, App.

Proc. §195. The record in this cause is in such con-

1. dition that the court is unable to determine with certainty whether there was a waiver of the right of trial by jury. The presumption is the trial court discharged its duty, and that the submission of the cause to the court for trial without the intervention of a jury was rightly done. *Pichon v. Martin* (1905), 35 Ind. App. 167, 170, 73 N. E. 1009; *Conrad v. Cleveland, etc., R. Co.* (1904), 34 Ind. App. 133, 137, 72 N. E. 489; *Shugart v. Miles* (1890), 125 Ind. 445, 454, 25 N. E. 551; *White v. Sun Publishing Co.* (1905), 164 Ind. 426, 73 N. E. 890.

Judgment affirmed.

NOTE.—Reported in 103 N. E. 12. See, also, under (1) 3 Cyc. 298; (2) 3 Cyc. 275.

Mitcheltree School Tp. v. Hitchcock—55 Ind. App. 698.

MITCHELTREE SCHOOL TOWNSHIP OF MARTIN
COUNTY v. HITCHCOCK.

[No. 8,217. Filed January 14, 1914.]

From Martin Circuit Court; *James W. Ogden*, Judge.

Action by Roscoe Hitchcock against Mitcheltree School Township of Martin County. From a judgment for plaintiff, the defendant appeals. *Reversed*.

Frank E. Gilkison, for appellant.

F. Gwin, for appellee.

IBACH, J.—The record in this case is practically identical with the record in the case of *Mitcheltree School Tp. v. Baker* (1913), 53 Ind. App. 473, 101 N. E. 1037. The same questions are presented by the pleadings, the same rulings were made in the trial court, and the same errors are assigned here. Upon the authority of that case the judgment is reversed, with directions to the trial court to overrule appellee's demurrer to appellant's answer, and for further proceedings not inconsistent with the opinion in that case.

MITCHELTREE SCHOOL TOWNSHIP OF MARTIN
COUNTY v. CHASTAIN.

[No. 8,218. Filed January 14, 1914.]

From Martin Circuit Court; *James W. Ogden*, Judge.

Action by Harvey Chastain against Mitcheltree School Township of Martin County. From a judgment for plaintiff, the defendant appeals. *Reversed*.

Frank E. Gilkison, for appellant.

F. Gwin, for appellee.

IBACH, J.—This case, as presenting the same questions, was consolidated for briefing purposes with the case of *Mitcheltree School Tp. v. Hitchcock* (1914), *ante* 698. Upon the authority of that case, the judgment is reversed, with directions to the trial court to overrule appellee's demurrer to appellant's answer, and for further proceedings not inconsistent with the opinion in that case.

Mitcheltree School Tp. v. Parker—55 Ind. App. 699.

MITCHELTREE SCHOOL TOWNSHIP OF MARTIN
COUNTY v. PARKER.

[No. 8,219. Filed January 14, 1914.]

From Martin Circuit Court; *James W. Ogden*, Judge.

Action by Ethel Parker against Mitcheltree School Township of Martin County. From a judgment for plaintiff, the defendant appeals. *Reversed*.

Frank E. Gilkison, for appellant.

F. Gwin, for appellee.

IBACH, J.—This case, as presenting the same questions, was consolidated for briefing purposes with the case of *Mitcheltree School Tp. v. Hitchcock* (1914), *ante* 698. Upon the authority of that case, the judgment is reversed, with directions to the trial court to overrule appellee's demurrer to appellant's answer, and for further proceedings not inconsistent with the opinion in that case.

MITCHELTREE SCHOOL TOWNSHIP OF MARTIN
COUNTY v. AKLES.

[No. 8,220. Filed January 14, 1914.]

From Martin Circuit Court; *James W. Ogden*, Judge.

Action by Albert Akles against Mitcheltree School Township of Martin County. From a judgment for plaintiff, the defendant appeals. *Reversed*.

Frank E. Gilkison, for appellant.

F. Gwin, for appellee.

IBACH, J.—This case, as presenting the same questions, was consolidated for briefing purposes with the case of *Mitcheltree School Tp. v. Hitchcock* (1914), *ante* 698. Upon the authority of that case, the judgment is reversed, with directions to the trial court to overrule appellee's demurrer to appellant's answer, and for further proceedings not inconsistent with the opinion in that case.

Mitcheltree School Tp. v. Marley—55 Ind. App. 700.

MITCHELTREE SCHOOL TOWNSHIP OF MARTIN
COUNTY v. MARLEY.

[No. 8,221. Filed January 14, 1914.]

From Martin Circuit Court; *James W. Ogden*, Judge.

Action by Herbert Marley against Mitcheltree School Township of Martin County. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Frank E. Gilkison, for appellant.

F. Gwin, for appellee.

IBACH, J.—This case, as presenting the same questions, was consolidated for briefing purposes with the case of *Mitcheltree School Tp. v. Hitchcock* (1914), *ante* 698. Upon the authority of that case, the judgment is reversed, with directions to the trial court to overrule appellee's demurrer to appellant's answer, and for further proceedings not inconsistent with the opinion in that case.

MITCHELTREE SCHOOL TOWNSHIP OF MARTIN
COUNTY v. HERRINGTON.

[No. 8,222. Filed January 14, 1914.]

From Martin Circuit Court; *James W. Ogden*, Judge.

Action by Lewis Herrington against Mitcheltree School Township of Martin County. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Frank E. Gilkison, for appellant.

F. Gwin, for appellee.

IBACH, J.—This case, as presenting the same questions, was consolidated for briefing purposes with the case of *Mitcheltree School Tp. v. Hitchcock* (1914), *ante* 698. Upon the authority of that case, the judgment is reversed, with directions to the trial court to overrule appellee's demurrer to appellant's answer, and for further proceedings not inconsistent with the opinion in that case.

Marion Trust Co. v. Bankers Life Assn.—55 Ind. App. 701.

**THE MARION TRUST COMPANY, ADMINISTRATOR, v.
THE BANKERS LIFE ASSOCIATION.**

[No. 8,054. Filed December 10, 1913. Rehearing denied
March 10, 1914.]

From Superior Court of Marion County (80,627); *Clarence E. Weir*, Judge.

Action by The Marion Trust Company, Administrator with the will annexed of the estate of Oliver H. Carson, against The Bankers Life Association. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Frank G. West and *Guilford A. Deitch*, for appellant.

Wiley & Jones and *I. M. Earle*, for appellee.

SHEA, J.—The questions presented in this appeal are the same in all essential particulars as those involved and decided in the case of *Stubbs v. Bankers Life Assn.* (1914), *ante* 579, 101 N. E. 638, and on the authority of that case, the judgment in this case is affirmed.

BROWN v. THE BANKERS LIFE ASSOCIATION.

[No. 8,032. Filed December 19, 1913. Rehearing denied
March 12, 1914.]

From the Superior Court of Marion County (79,797); *Clarence E. Weir*, Judge.

Action by Anna Brown against The Bankers Life Association. From a judgment for defendant, the plaintiff appeals. *Affirmed.*

Frank G. West and *Guilford A. Deitch*, for appellant.

Wiley & Jones and *I. M. Earle*, for appellee.

LAIBY, C. J.—This was an action brought by appellant against appellee to recover on a certificate of insurance. The case was submitted to the trial court on an agreed statement of facts and there was a finding and judgment in favor of appellee. The case of *Stubbs v. Bankers Life Assn.* (1914), *ante* 579, 101 N. E. 638, in all essential respects, is identical with the case at bar, and decides all questions here involved adversely to appellant. On the authority of that case and the case of *Marion Trust Co. v. Bankers Life Assn.* (1914), *ante* 701, 103 N. E. 508, the judgment is affirmed.

INDEX

[NOTE.—The citation *American Seeding Mach. Co. v. Baker*, 625, 627 (1), indicates that the case begins on page 625, the point cited is on page 627, and that such point is numbered 1 in the margin.—REPORTER.]

ABANDONMENT—

See SCHOOLS AND SCHOOL DISTRICTS 4, 6.

ACCIDENT—

On crossings, see RAILROADS 1-13.

ACCORD AND SATISFACTION—

1. *Part Payment*.—Generally, the payment of less than the full amount of a past due and liquidated claim under an agreement to accept such amount in full payment of the debt only operates as a discharge of the debt *pro tanto*, in the absence of some other consideration. *American Seeding Mach. Co. v. Baker*, 625, 627 (1).
2. *Part Payment*.—*Check*.—A negotiable security for a smaller amount given and accepted in satisfaction of a larger debt will operate effectually in discharge of it; hence a bank check, being of the same negotiable character as an inland bill of exchange, when given and accepted in a less amount as payment of a liquidated claim, will operate as a discharge of the debt in full.
American Seeding Mach. Co. v. Baker, 625, 627 (2).

ACKNOWLEDGMENT—

Invalid certificate of, see CHATTEL MORTGAGES 4.

Sufficiency of Certificate.—*Essentials for Recording*.—Under §7472 Burns 1908, Acts 1897 p. 240, providing that as a prerequisite to the recording of a chattel mortgage, it shall be acknowledged as provided in cases of deeds of conveyance, and §3982 Burns 1908, §2947 R. S. 1881, providing what shall constitute a sufficient acknowledgement of any deed or mortgage, a certificate to a chattel mortgage merely stating that the mortgagors signed the instrument, was invalid, and such mortgage was not entitled to be recorded.
Guyer v. Union Trust Co., 472, 485 (4).

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APPEAL.

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| <p>I. APPELLATE JURISDICTION, 1, 2.</p> <p>II. DECISIONS REVIEWABLE, 3-21.</p> <p>III. RIGHT OF REVIEW, 22.</p> <p>IV. PRESENTATION AND RESERVATION IN LOWER COURT, 23-27.</p> <p>V. TIME OF TAKING PROCEEDINGS, 28, 29.</p> <p>VI. RECORD AND PROCEEDINGS NOT IN RECORD, 30, 31.</p> <p>VII. ASSIGNMENT OF ERRORS, 32-53.</p> <p>VIII. BRIEFS, 54-66.</p> <p>IX. DISMISSAL, 67-74.</p> | <p>X. REVIEW,</p> <p>(a) SCOPE AND EXTENT IN GENERAL, 75.</p> <p>(b) AS TO EVIDENCE, 76-87.</p> <p>(c) AS TO INSTRUCTIONS, 88-97.</p> <p>(d) AS TO PLEADINGS, 98-101.</p> <p>(e) PRESUMPTIONS, 102, 103.</p> <p>(f) VERDICT, FINDINGS AND RULINGS ON MOTIONS, 104-121.</p> <p>(g) HARMLESS ERROR, 122-151.</p> <p>(h) ERROR WAIVED, 152, 153.</p> <p>(i) SUBSEQUENT APPEAL, 154, 155.</p> <p>XI. DETERMINATION AND DISPOSITION OF CAUSE,</p> <p>(a) AFFIRMANCE, 156-159.</p> |
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I. APPELLATE JURISDICTION.

1. *Jurisdiction.—Moot Questions.*—Where there is no question of general public interest involved in an appeal, and nothing is in dispute between the parties under the issues of the case on which the court could grant relief by any judgment it might render, jurisdiction will not be retained to determine merely an incidental question of costs. *Modlin v. Board, etc.*, 239, 241 (2).
2. *Jurisdiction.—Moot Questions.*—Where, after suit was brought to enjoin the letting of a contract for the construction of a highway, and prior to an appeal from the judgment rendered, the bid was let and the work was completed, so that a reversal of such judgment could not be followed by an injunction, the right to such injunction is merely a moot question requiring a dismissal of the appeal, even though appellant thereby becomes liable on the injunction bond, since the question of such liability is not an issue in the case before the court. *Modlin v. Board, etc.*, 239, 241 (3).

II. DECISIONS REVIEWABLE.

3. *Assignment of Errors.*—No question is presented for review on appeal by the assignment that the verdict is not sustained by sufficient evidence, or that it is contrary to law, but such questions should be presented as grounds for a new trial. *Illinois Surety Co. v. State, ex rel.*, 31, 36 (6).
4. *Motion for Judgment on Answers to Interrogatories.*—In considering a motion for judgment on the jury's answers to interrogatories the court on appeal looks only to the pleadings, the general verdict, and the interrogatories and answers thereto. *Illinois Surety Co. v. State, ex rel.*, 31, 36 (4).
5. *Motion to Modify Judgment.*—A trial court is entitled to know on what ground a motion to modify a judgment is based, hence no question is presented on appeal under an assignment of error in the overruling of such a motion, where no reasons were stated in such motion for the modification asked. *Heaton v. Grant Lodge, etc.*, 100, 103 (1).

APPEAL—Continued.

6. *Admission of Evidence.*—No available error is presented as to the ruling on a motion to strike out the answer to a question to which no objection was made, and which assigned only that the answer was immaterial.
Louisville, etc., Lighting Co. v. Holsclaw, 85, 86 (1).
7. *Admission of Evidence.*—*Briefs.*—No question is presented on alleged error in the admission in evidence of certain exhibits and in refusing to strike out certain depositions, where appellants' brief fails to disclose in the statement of the record that the court ever ruled on the motion to strike out, or that any exception was reserved, and fails to set out the exhibits with sufficient certainty to enable the court to say whether their admission was harmful, or to set out the nature of the objection made in the trial court.
Southern Express Co. v. Schurz, 213, 214, (1).
8. *Objections to Evidence.*—A mere suggestion of error or even a general objection to the admission of evidence is not sufficient to present any question on appeal as to its admissibility.
Hall v. Grand Lodge, etc., 324, 330 (6).
9. *Record.*—*Evidence.*—Where the evidence relating to the issues joined in a suit between the parties is not in the record on appeal from the judgment rendered in a subsequent action, the court, on appeal, cannot determine what questions were or might have been determined in such prior suit.
City of Huntington v. Kaufman, 341, 346 (6).
10. *Application for Continuance.*—One entitled to a continuance should apply to the court regularly to that end, and while the granting of such application may be in the discretionary power of the court, an abuse of such discretion is reviewable on appeal.
Houser v. Laughlin, 563, 570 (3).
11. *Briefs.*—No question is presented on alleged error in sustaining a demurrer to a paragraph of set-off, where neither the demurrer nor the substance is set out in appellant's brief.
Rahke v. McNulty, 615, 616 (1).
12. *Briefs.*—Where neither the motion for a new trial, nor its substance, appears in appellant's brief, error can not be predicated upon rulings of the trial court with respect to the giving or refusal of instructions, even if the questions are otherwise properly presented.
Rahke v. McNulty, 615, 616 (3).
13. *Sufficiency of Evidence.*—*Briefs.*—No question is presented on the alleged insufficiency of the evidence where there is no attempt to set out the evidence in appellants' brief, or to give a condensed recital thereof in narrative form.
Newman v. Horner, 298, 303 (6).
14. *Overruling Motion for New Trial.*—No question is presented on the overruling of a motion for new trial, where neither the motion nor the substance is set out in appellant's brief.
Rahke v. McNulty, 615, 616 (5).
15. *Briefs.*—*Record.*—No available error is presented as to the admission and exclusion of evidence, where neither the pages nor the lines of the record where such evidence, or the exceptions, can be found, are pointed out in appellants' brief.
McKinley v. Britton, 21, 29 (11).
16. *Briefs.*—Although appellants' briefs show only a partial compliance with clause 5 of Rule 22, the court will consider the questions in so far as they can be ascertained from the briefs with

APPEAL—Continued.

reasonable certainty, so that the demurrer to a complaint will be considered where a copy of such complaint is appended to the briefs and sufficient reference thereto is made in such briefs.

Newman v. Horner, 298, 299 (1).

17. *Findings and Conclusions of Law.—Briefs.*—Where neither the special findings nor their substance is set out in appellants' brief, there is no compliance with clause 5 of Rule 22 so as to present any question thereon, and though the substance of some of the findings is sufficiently set forth, no question is presented where it does not appear from the briefs that exceptions were reserved to the conclusions of law. *Newman v. Horner*, 298, 302 (5).

18. *Briefs.*—The statement in appellants' brief, under the heading "Errors", that "the court erred in overruling appellants' motion to modify the judgment and decree entered in the cause. * * * The court erred in overruling appellants' motion for a new trial", was insufficient to present any question on appeal, where neither of such motions was set out, and it nowhere appeared from such brief that such rulings were among those assigned as error, or that they were relied on for reversal, or that appellants had in fact assigned any error. *Davis v. Broyles*, 316, 317 (1).

19. *Instructions.*—Only instructions to which objections were made and which were assigned as causes for a new trial can be considered on appeal. *Cohen v. Reichman*, 164, 168 (5).

20. *Instructions.—Record.*—The writing of the words "refused and excepted to" at the end of instructions requested and refused by the court, followed by the signature of the attorneys reserving the exceptions and the date, and the words "given and excepted to", together with like signature and date, at the close of instructions given, did not serve to bring the instructions into the record either under §660 Burns 1908, §629 R. S. 1881, or under §§558, 559, 560 Burns 1908, §§533, 534, 535 R. S. 1881, and, in the absence of proper authentication by the signature of the judge, they were not in the record under §561 Burns 1908, Acts 1907 p. 652, nor could they be considered for the further reason that the record disclosed no order book entry or order of the court showing the filing of the instructions in accordance with §691 Burns 1908, §650 R. S. 1881.

Patterson v. State Bank, etc., 331, 339 (12).

21. *Judgments Reviewable.—Final Judgment.—Judgment for Costs.*—Although the judgment appealed from was for costs only and did not contain the usual and proper statement that plaintiff take nothing by his complaint, it was a judgment from which an appeal could be prosecuted, where the record clearly disclosed a trial and a final and effectual disposition of the cause and a judgment for all costs rendered in pursuance of such disposition.

Baker v. Osborne, 518, 519 (1).

III. RIGHT OF REVIEW.

22. The right of appeal is a right conferred only by statute, and it must be exercised in conformity with the rules provided by statute. *City of Huntington v. Kaufman*, 341, 345 (5).

IV. PRESENTATION AND RESERVATION IN LOWER COURT.

23. *Presentation of Questions Below.—Errors Occurring at Trial.*—Errors occurring at the trial are not available on appeal unless assigned as cause for new trial and presented to the trial court for correction. *Cohen v. Reichman*, 164, 167 (4).

APPEAL—Continued.

24. *Questions Reviewable.—Ruling on Motion for New Trial.—Sufficiency of Special Findings.*—The sufficiency of a special finding of facts is not tested by a motion for a new trial, where the ruling on such motion was not properly presented for review on appeal.
Guyer v. Union Trust Co., 472, 487 (9).
25. *New Trial.—Necessity for Motion.*—Where defendant, against whom judgment has been rendered by default, does not contest the amount of the damages, but merely moves for relief from the judgment, it is sufficient to present the matter on appeal by assigning error in the ruling on such motion; a motion for a new trial being in such case not only unnecessary, but inappropriate.
Houser v. Laughlin, 563, 572 (6).
26. *New Trial.—Motion.—Necessity.*—Although as a general rule error based on the ruling on a motion for a change of venue must be assigned in the motion for a new trial in order to be presented on appeal, it may be presented as an independent assignment of error where the judgment appealed from is entered by default, since in such case there is no trial in the sense of a trial that requires the instrumentality of a motion for new trial to obtain relief from the judgment.
Houser v. Laughlin, 563, 568 (1).
27. *Questions Presented for Review.—Motion for New Trial.*—No question is presented for review on appeal on the overruling of a motion assigning as causes for new trial "that the finding and judgment of the court is not sustained by sufficient evidence," and "that the finding and judgment of the court is contrary to law."
Southern Express Co. v. Schurz, 213, 215 (3).

V. TIME OF TAKING PROCEEDINGS.

28. *Time for Perfecting.*—Under §672 Burns 1908, §633 R. S. 1881, an appeal must be taken within one year from the time the judgment is rendered, but where judgment precedes the overruling of the motion for new trial the time for taking the appeal begins to run from the date of the ruling on such motion.
Huber v. Tielking, 577, 578 (1).
29. *Appeal Bond.—Failure to Fix Terms.*—Appellant cannot urge as error the trial court's failure to fix the amount of the appeal bond, or the time in which to file it, where he made no attempt to perfect a term time appeal and chose to perfect it as a vacation appeal.
Houser v. Laughlin, 563, 576 (12).

VI. RECORD AND PROCEEDINGS NOT IN RECORD.

30. *Record.—Duty to Show Error.*—It is the duty of appellant to bring to the court a properly prepared record showing affirmatively prejudicial error.
Smith v. Collins, 695, 697 (2).
31. *Record.—Matters Dehors the Record.*—The appellate tribunal derives its knowledge of the proceedings and judgment from which the appeal is prosecuted from the duly authenticated transcript, and it may not go outside the record for such information.
Jenkins v. Steele, 11, 20 (11).

VII. ASSIGNMENT OF ERRORS.

32. *Sufficiency.*—An assignment that "the court erred in giving instructions Nos. 4 and 5 and in refusing to give all of the instructions asked by appellant," presents no question.
Rahke v. McNulty, 615, 616 (4).

APPEAL—Continued.

33. *Record.—Construction.*—On appeal by several defendants, where the record as originally filed showed that to the amended complaint the defendants filed "their several demurrers which said several demurrers are respectively in these words: (not on file)," and the overruling of the demurrers to which "defendants severally except," and by a return to a writ of *certiorari* it appears that defendants filed their "several demurrer," which is set out, but no ruling is shown, the court can not determine whether one or more than one demurrer was filed, and hence no question is presented by an assignment that "the court erred in overruling the demurrer to the amended complaint."
Kelley, v. Scanlan, 611, 613 (2).
34. *Joint Assignment.—Sufficiency.*—Where only one of several defendants moved for a new trial, a joint assignment of error in the overruling of such motion presents no question.
Guyer v. Union Trust Co., 472, 482 (2).
35. *Sufficiency.—Joint Assignment.*—A joint assignment of error in overruling a demurrer is insufficient to present any question, where the demurrer or demurrers, and the exceptions to the rulings thereon, were separate and several as to each appellant.
Kelley v. Scanlan, 611, 614 (3).
36. *Briefs.*—The assignment of errors is the complaint on appeal, and such errors as are relied on for reversal must be set out in appellant's brief in order to present any question thereon, hence where there is a failure to comply with the rules of court in this respect, an affirmance of the judgment is required.
Wickersham v. McGaughey, 669, 670 (1).
37. *Briefs.*—No question is presented by the assignments that the court erred in sustaining a demurrer to a plea in abatement, in overruling a demurrer to a complaint, and in the conclusions of law, where neither the demurrers and the pleadings to which they were addressed, nor the substance of either, nor the special finding of facts, conclusions of law, and the motion for new trial are set out in appellant's brief.
Ohio Farmers Ins. Co. v. Geddes, 30, 31 (1).
38. *Jurisdiction.*—The assignment of errors constitutes the complaint on appeal and jurisdiction can only be acquired over the parties whose full names appear therein.
Jenkins v. Steele, 11, 13 (1).
39. *Ruling on Motion to Suppress Deposition.—New Trial.*—The ruling on a motion to suppress a deposition cannot be assigned as independent error on appeal, but should be assigned as one of the grounds for new trial.
Cohen v. Reichman, 164, 167 (1).
40. *Right to Prosecute Appeal.—Failure of Coappellant to File.*—The right to prosecute an appeal by one, who has properly perfected same and filed an assignment of errors, is not affected by the fact that a coappellant has failed to file its assignment of errors in time.
Huber v. Tielking, 577, 578 (3).
41. *Overruling Motion for New Trial.—Joint Assignment.*—The overruling of a motion for new trial, where such motion was separate and several as to the parties, and they separately and severally excepted to the ruling, can not be presented by a joint assignment of error.
Kelley v. Scanlan, 611, 614 (4).
42. *Ruling on Supplemental Motion for New Trial.*—Where a supplemental motion for new trial was filed while the original motion was pending and within the time allowed for filing the

APPEAL—Continued.

- original motion, an assignment of error based on the supplemental motion was not available, since, the two motions being in effect one only, the assignment should have been based on the original motion. *Fisher v. Southern R. Co.*, 599, 604 (6).
43. *Failure to Set Out Names of Parties.*—Failure to set out in the assignment of errors the full names of all the parties to the judgment appealed from renders the assignment defective and unavailing. *Jenkins v. Steele*, 11, 16 (5).
44. *Manner of Presenting.*—By virtue of §696 Burns 1908, §655 R. S. 1881, as well as by Rule 4 of the court, appellant is required to make a specific assignment of errors on the transcript, or on some paper attached thereto, so that an assignment on a detached paper, though filed in time, cannot be considered a proper assignment of errors. *Huber v. Tielking*, 577, 579 (4).
45. *Failure to File in Time.—Dismissal.*—The assignment of errors constitutes the complaint on appeal and must be filed within the time allowed by statute, so that where the time for completing an appeal has elapsed without an assignment of errors having been filed, a dismissal of the appeal is required, since the court is without power to extend the time for filing such assignment. *Huber v. Tielking*, 577, 578 (2).
46. *Defect in Name of Parties.*—Where the assignment of errors showed "Lee" as the christian name of the appellant and the record showed that the judgment appealed from was against one with the same surname, but whose christian name was "Leroy," there was no duty upon the appellee, in order to procure a dismissal, to show that the party named in the assignment was not the party against whom the judgment was rendered. *Jenkins v. Steele*, 11, 18 (7).
47. *Right to Amend.—Laches.*—The right to amend an assignment of errors does not exist after the year allowed by statute for perfecting an appeal has passed, and even if such right existed, where appellee's brief calling attention to a defect in the assignment of errors was filed November 13, and the year allowed for perfecting the appeal did not expire until March 14, of the following year, appellant, who with full knowledge of the defect waited and took his chances, was guilty of such laches as to be deprived of the right to amend the assignment and to a reinstatement of the appeal after a dismissal. *Jenkins v. Steele*, 11, 19 (9).
48. *Ruling on Demurrer.—Joint Assignment.*—Where there were several defendants to an action, any one of whom might have filed a demurrer, an assignment of error on appeal that "the court erred in overruling the demurrer to the amended complaint," presents no question. *Kelley v. Scanlan*, 611, 613 (1).
49. *Names Idem Sonans.—Dismissal.*—Lee Jenkins and Leroy Jenkins are not *idem sonans*, so that an assignment of errors in the name of Lee Jenkins, appellant, is insufficient to confer jurisdiction to decide questions relating to a judgment against Leroy Jenkins, and, no judgment appearing from the record against Lee Jenkins, a dismissal is required, especially where appellant's attention was called to the defective assignment and he made no effort within the year allowed for appeal to remedy the defect. *Jenkins v. Steele*, 11, 14 (2), 16 (2), 18 (2).
50. *Waiver.*—An assignment of error is waived by failure to discuss it in appellants' brief. *Guyer v. Union Trust Co.*, 472, 475 (1), 482 (1).

APPEAL—Continued.

51. *Waiver*.—Alleged errors in overruling and sustaining demurrers are waived by appellant's failure to discuss same.
Vandalia Coal Co. v. Underwood, 91, 93 (1).
52. *Defective Assignment of Errors*.—*Waiver of Right to Dismiss*.—An appellee, by failing to file a motion to dismiss and by filing a brief on the merits, does not waive the right to have the appeal dismissed where it appears that the assignment of errors is insufficient to present any question relating to the judgment shown by the transcript, and the court may order a dismissal on its own motion.
Jenkins v. Steele, 11, 17 (6), 18 (6).
53. *Defect*.—*Waiver*.—Although many irregularities and requirements concerning an appeal may be waived by appearance, or joinder in error, and by filing a brief on the merits, and some questions not properly presented are within the legal discretion of the court, there is no rule of waiver, or decision, whereby an appellant is entitled to a decision on the merits in the absence of a transcript of the record accompanied by an assignment of errors relating to the particular judgment shown by the record, and properly challenging its correctness.
Jenkins v. Steele, 11, 15 (4).

VIII. BRIEFS.

54. *Waiver of Objections*.—Objections to a complaint, not urged in appellants' briefs on appeal, are waived.
Newman v. Horner, 298, 299 (2).
55. *Waiver of Error*.—Grounds of appellant's motion for a new trial that are not stated or discussed in its brief on appeal are waived.
United States, etc., Ins. Co. v. Emerick, 591, 599 (7).
56. *Questions Waived*.—*Causes for New Trial*.—Causes assigned in a motion for new trial are waived on appeal by appellant's failure to present them in the briefs.
First Nat. Bank v. Ransford, 663, 667 (6).
57. *Failure to Show Error*.—The court on appeal will not go beyond appellant's brief in search of error to reverse the judgment below.
Baker v. Osborne, 518, 523 (5).
58. *Curing Defects*.—*Reply Brief*.—Omissions in appellant's original brief pointed out by appellees' brief cannot be cured by supplying them in the reply brief.
Fox v. Worm, 516, 517 (2).
59. *Ruling on Motion for Judgment on Answers to Interrogatories*.—To present error in the ruling of the trial court on a motion for judgment on the jury's answers to interrogatories, appellant's brief should contain a copy of the pleadings, or their substance.
Egan v. Louisville, etc., Traction Co., 423, 425 (2).
60. *Sufficiency*.—*Good Faith Effort*.—Although appellant's briefs are subject to criticism as not fully complying with the rules of court, where they disclose a good faith effort to comply therewith, such questions as may be definitely ascertained therefrom will be considered and decided.
Harmon v. Pohle, 439, 442 (3).
61. *Questions Considered*.—Although appellant's failure to set out in its brief the exact page and line of the record where all the instructions may be found was a technical violation of Rule 22, the defect did not bar a consideration of the questions, in view of the fact that both appellant and appellee had filed helpful briefs containing much argument and citation of authorities.
Evansville Gas, etc., Co. v. Robertson, 353, 361 (5).

APPEAL—Continued.

62. *Questions Reviewed.*—Although much of appellant's brief is not in conformity to clause 5 of Rule 22, where appellees' brief, though in the main devoted to pointing out the defects of appellant's brief, supplies some facts and discusses the merits of some of the questions, the court will decide such questions as are definitely ascertainable from a consideration of both briefs.
Hall v. Grand Lodge, etc., 324, 326 (1).
63. *Admissions.—Scope and Effect.*—An admission in appellant's brief that the drainage commissioners made an order establishing a ditch carried with it the implication that they found the existence of the facts essential to jurisdiction, so that in the absence of an affirmative showing that appellant had no notice of the proceedings, it will be presumed as against collateral attack that he was properly served with notice. *Baker v. Osborne*, 518, 521 (3).
64. *Statement of Evidence.—Sufficiency.*—Where appellant's contention, in an action to enjoin the collection of assessments levied in a ditch proceeding, was that he had no notice of such proceeding, and his brief stated that the record in such proceeding, and proof of service, were introduced, showing that service was not had on him, without setting them out, there was no sufficient compliance with clause 5 of Rule 22, providing for a condensed recital of the evidence in narrative form.
Baker v. Osborne, 518, 520 (2), 522 (2).
65. *Points and Authorities.—Evidence.*—No reversible error was presented on the assignment that the court erred in overruling the motion for new trial, where the specifications of the motion relied upon were that the verdict was not sustained by sufficient evidence and that it was contrary to law, and appellant failed to indicate in his brief the application of the points and authorities therein contained, and failed to set out a condensed recital of the evidence in narrative form.
Wolf v. Akin, 589, 590 (1).
66. *Record.—Duty to Show Error.*—The court on appeal will not search the record to find grounds for reversal, but it is the duty of appellant to so prepare the briefs that the judges who do not have the record may familiarize themselves with the merits of the questions without resort to the record.
Southern Express Co. v. Schurz, 213, 214 (2).

IX. DISMISSAL.

67. *Motion to Reinstate.*—A motion to reinstate an appeal after dismissal is recognized in the practice of this State.
Jenkins v. Steele, 11, 14 (3).
68. An appeal may be dismissed as to a portion of the appellants where such dismissal will not affect the others.
Crawfordsville Trust Co. v. Ramsey, 40, 62 (3).
69. *Determination of Costs.*—An appeal will not be entertained for the sole purpose of determining who should pay the cost of the litigation.
Crawfordsville Trust Co. v. Ramsey, 40, 63 (5).
70. *Record.—Failure to Show Judgment.*—Where the record on appeal does not disclose that any judgment was rendered by the trial court, the appeal is unfounded and a dismissal is required.
Board, etc. v. Hutson, 447 (1).
71. *Insufficiency of Briefs.*—Where none of the questions attempted to be presented by appellants' brief on appeal can be intelligently determined without resort to the record, a dismissal of the appeal is required.
Davis v. Broyles, 316, 317 (2).

APPEAL—Continued.

72. *Settlement of Controversy*.—An appeal will be dismissed where it is properly and conclusively made to appear that the litigation has been in some manner ended and disposed of so as to render unnecessary the determination of the questions presented.
Crawfordsville Trust Co. v. Ramsey, 40, 62 (4).
73. *Want of Actual Controversy*.—Where, pending an appeal to the Appellate Court from a judgment for plaintiff in an action by a widow involving the question of whether she was bound by her election to take under the will, and questions incident thereto, as well as the validity of certain assignments made by testator, the Supreme Court affirmed a judgment declaring the will void, the questions involved, except as to the validity of the assignments, were thereby eliminated and a dismissal of the appeal is required as to those appellants having no interest in the remaining question. *Crawfordsville Trust Co. v. Ramsey*, 40, 63 (6).
74. *Defective Term Time Appeal—Waiver of Defect—Joinder in Error*.—Where, in attempting to perfect a term time appeal, appellant omits to name and procure the approval of the sureties on the appeal bond at the term of court at which judgment was rendered, such omission is ground for dismissal of the appeal; but, where appellee joins in error, such joinder operates as a waiver of the right to a dismissal.
Kyger v. Stallings, 196, 198 (1).

X. REVIEW.**(A) SCOPE AND EXTENT IN GENERAL.**

75. *Theory of Case—Review*.—Where appellant failed to set out in his brief a copy of the complaint, but has set out therein the instructions given at his request, and containing the substance of his complaint from which it is disclosed that the theory at the trial was that of a common-law action for negligence arising out of the relation of master and servant, he will be confined to that theory on appeal and will not be permitted to urge that the action was based on subd. 2 of §1 of the Employers' Liability Act (§8017 Burns 1908, Acts 1893 p. 294).
Egan v. Louisville, etc., Traction Co., 423, 424 (1).

(B) AS TO EVIDENCE.

76. *Weighing Evidence—Records*.—It is the province of the court on appeal to declare what force and effect shall be given to evidence consisting entirely of records.
Sullenger v. Baecher, 365, 369 (4).
77. *Findings*.—Where there was some evidence to support each of the material facts found by the court, the decision is sustained by sufficient evidence.
Seigmund v. Williams, 498, 502 (3).
78. *Findings*.—Where there is evidence tending to support the finding of the court, the judgment will not be reversed for insufficiency of evidence.
Dittman v. Keller, 448, 452 (5).
79. *Decision*.—Where there is any evidence to support the decision of the trial court, a reversal on the ground of insufficient evidence will be denied.
Buttz v. Warren Mach. Co., 347, 348 (1).
80. *Objections to Evidence*.—A general objection to the admission of evidence, without the statement of any reason, is not available on appeal.
Euler v. Euler, 547, 557 (8).

APPEAL—Continued.

81. *Sufficiency*.—Where each material averment of the complaint has some evidence for its support, a judgment for plaintiff will not be reversed on the ground of insufficient evidence.
Euler v. Euler, 547, 562 (18).
82. Where no objection was made to any evidence admitted on an issue, all the evidence in support of the decision of the trial court on that issue will be considered by the court on appeal.
Buttz v. Warren Mach. Co., 347, 348 (3).
83. *Objections to Evidence*.—*Waiver*.—*Briefs*.—Questions relating to the admissibility of evidence are waived by the failure of appellant's brief to contain a statement of any propositions or points relating thereto, and also by a failure to contain a condensed recital of the evidence in narrative form as required by Rule 22.
Hall v. Grand Lodge, etc., 324, 330 (7).
84. *Weight of Evidence*.—*Affidavits on Motion to Set Aside Default*.—Affidavits and counter-affidavits on a motion to set aside a judgment taken by default partake of the nature of depositions and parol testimony, and not of the nature of documentary evidence, and are within the rule against weighing the evidence on appeal, hence, on appeal, a judgment overruling such a motion, supported by counter-affidavits against the motion, will not be disturbed on the evidence.
Kruse v. State, ex rel., 203, 207 (2).
85. *Presenting Questions for Review*.—*Exclusion of Evidence*.—In order to present error on the refusal of the trial court to admit certain evidence, the question propounded should be set out in the record together with a statement of what the answer was expected to prove.
Cohen v. Reichman, 164, 170 (12), 171 (12).
86. *Exclusion of Evidence*.—Evidence of loss of credit, offered in support of a counterclaim grounded on a loss of credit by appellants through the institution of the suit against them, was neither relevant nor competent and was properly excluded, in the absence of a showing that such loss of credit resulted from, or that those refusing the credit were in any way influenced by, the filing of the suit.
Cohen v. Reichman, 164, 170 (11).
87. *Admission of Evidence*.—*Sufficiency of Motion to Strike Out*.—In an action for personal injuries from the fall of a scaffold furnished by defendant for plaintiff in the performance of certain work for defendant, where plaintiff, on direct examination, testified that after the accident he had examined the piece of timber which broke in the scaffold, and again on redirect examination was examined concerning it, and then on re-cross-examination it was developed that he had no personal knowledge that the timber examined had been a part of the scaffold, a motion "to strike out the evidence on that piece of timber because he is testifying as to hearsay", was not sufficiently specific and the overruling of the same was not error.
Talge Mahogany Co. v. Hockett, 303, 308 (3).

(C) AS TO INSTRUCTIONS.

88. *Consideration of Instructions*.—The court on appeal in reviewing questions presented on the instructions, will consider such instructions as a whole.
Evansville Gas, etc., Co. v. Robertson, 353, 361 (8).
89. *Presentation of Questions Below*.—All questions upon alleged errors of the trial court in the giving or refusal of instructions must be presented by motion for a new trial.
Rahke v. McNulty, 615, 616 (2).

APPEAL—Continued.**90. Effect of Erroneous Instructions.—Answers to Interrogatories.**

—In an action against a railroad company for injuries sustained at a highway crossing, where it is apparent from the record that many of the answers to interrogatories tending to show contributory negligence were in a measure influenced by error in instructions, such error must be deemed to have been prejudicial.

Virgin v. Lake Erie, etc., R. Co., 216, 231 (18).

91. In an action for the death of a lineman while at work on an electric light pole, neither an instruction objected to on the ground that the court usurped the right of the jury in saying directly what it was or was not the duty of decedent to do, nor one stating that unless decedent was guilty of some negligent act in touching the charged wire, he was not guilty of contributory negligence, was erroneous.

Evansville, Gas, etc., Co. v. Robertson, 353, 362 (9).

92. There was no error in instructing on the doctrine of last clear chance where the issues and evidence warranted the application of the doctrine; nor in the refusal of an instruction stating that if plaintiff's negligence continued to the time of his injury, he could not recover, even if defendant was negligent.

Indiana Union Traction Co. v. Kraemer, 190, 194 (4).

93. Although an instruction that "defendant's answer in general denial * * * places upon him the burden of proving every material allegation of his complaint" was erroneous in the use of the word "him" instead of "plaintiff," the question of whether it was prejudicial was immaterial in view of reversible error in other instructions.

Harmon v. Pohle, 439, 444 (6).

94. Damages.—In the absence of any evidence in the record which might have improperly influenced the jury in estimating the damages, an instruction directing it to consider all the facts and circumstances in the case in estimating the damages, though objectionable in not limiting the consideration to the facts and circumstances bearing on the question of damages, could not have affected the amount of the verdict and was harmless.

Kingan & Co. v. Gleason, 684, 693 (12).

95. Necessity for Request.—Objections on the ground of the incompleteness of instructions are waived, where appellant failed to request fuller instructions.

National Fire, etc., Co. v. Smith, 124, 145 (17).

96. Refusal of Instructions.—There was no error in the refusal of instructions fully covered by instructions given.

Kingan & Co. v. Gleason, 684, 694 (13).

97. Refusal of Instructions.—The refusal of requested instructions is not erroneous, where, in so far as they are correct, they are fully covered by the instructions given.

Burford v. Dautrich, 384, 387 (3).

(D) AS TO PLEADINGS.

98. Sufficiency of Pleadings.—On appeal the sufficiency of a pleading will be determined with reference to its theory as adopted in the trial court.

Euler v. Euler, 547, 553 (2).

99. Sufficiency of Pleadings.—The court on appeal is not warranted in reversing judgment on the ground that pleadings lack scientific accuracy, if they are substantially sufficient.

Burford v. Dautrich, 384, 387 (2).

APPEAL—Continued.

100. *Sufficiency of Complaint.—Waiver of Defects.—Briefs.*—Reasons for the alleged insufficiency of a complaint are waived on appeal by appellant's failure to present in its brief any point, proposition or authority in support of same.

First Nat. Bank v. Ransford, 663, 665 (1).

101. *Pleading.—Theory.*—Where a pleading is reasonably open to two interpretations, that construction will be accepted on appeal which is in accord with and tends to sustain the ruling of the trial court on a demurrer to such pleading, unless the record shows that the lower court adopted the other theory.

McKinley v. Britton, 21, 24 (3).

(E) PRESUMPTIONS.

102. *Presumptions.—Duty to Show Error.*—On appeal every presumption is in favor of the lower court and it devolves on appellant to show affirmatively by the record that there is manifest error in the judgment shown by the record.

Jenkins v. Steele, 11, 19 (8).

103. *Presumptions to Support Judgment.—Theory of Complaint.*—Although appellant insists that a paragraph of complaint to which a demurrer was sustained was sufficient on the theory of an action to quiet title, where it was susceptible to the construction that it was on the theory of an action to set aside a deed on the ground of fraud and undue influence, it will be assumed that the demurrer was sustained because the trial court construed it as proceeding on the same theory as another paragraph seeking to have such deed set aside for fraud, and that the same evidence was necessary to a recovery under each paragraph, and the error, if any, was harmless in view of the fact that the finding shows that the evidence to support such theory was in fact admitted.

McKinley v. Britton, 21, 25 (6).

(F) VERDICT, FINDINGS AND RULING ON MOTIONS.

104. *Verdict.*—The court on appeal will not disturb a verdict on the evidence if there is some evidence to support every essential element.

Burford v. Dautrich, 384, 392 (11).

105. *Verdict.—Evidence.*—Where there is some evidence to support a verdict it is sufficient on appeal, since the court cannot weigh conflicting evidence.

Illinois Surety Co. v. State, ex rel., 31, 37 (8).

106. *Conclusiveness of Verdict.*—The court on appeal will not disturb a verdict on the ground of insufficient evidence if there is any evidence to sustain it.

Evansville Gas, etc., Co. v. Robertson, 353, 365 (15).

107. *Verdict.—Evidence.—Sufficiency.*—In an action on a claim against an estate, where there was evidence to sustain every material allegation of the claim, the evidence was sufficient to support the verdict for claimant.

Patterson v. State Bank, etc., 331, 337 (5).

108. *Verdict.—Answers to Interrogatories.*—In reviewing the ruling on a motion for judgment on the jury's answers to interrogatories, the court on appeal can look only to the pleadings, general verdict and the answers to the interrogatories, and can indulge no intendments or presumptions in favor of such answers, but must reconcile them with each other and with the general verdict, if it reasonably can be done.

Beard v. Goulding, 398, 401 (2).

APPEAL—Continued.

109. *Verdict.—Answers to Interrogatories.*—Where it appears from the record that an action for damages caused by the unlawful sale of liquor was submitted to the jury on two paragraphs of complaint, one of which proceeded on the theory that the license was issued to John S. and that the saloon was run by him and his agents, and the other alleged that the license was issued to James S. under the name of John S., answers by the jury to interrogatories showing that the license was issued to John S. and that he and James S. were separate individuals, are not in irreconcilable conflict with a general verdict for plaintiff.
Illinois Surety Co. v. State, ex rel., 31, 35 (3), 36 (3).
110. *Findings.*—In reviewing the action of the trial court for the purpose of determining whether there was error in assessing the amount of damages, only such evidence as tends to sustain the finding of the trial court can be considered.
American Sand, etc., Co. v. Spencer, 523, 528 (2).
111. *Findings.—Conclusiveness.*—In an action to recover on a policy of insurance, in which a reformation as to the date of the instrument was sought, the finding of the trial court that the date shown in the policy was the result of mutual mistake cannot be disturbed on the weight of evidence, where there was evidence sufficient to warrant such finding.
United States, etc., Ins. Co. v. Emerick, 591, 598 (6).
112. *Findings.—Ruling on Motion for Venire de Novo.*—Where the special findings of fact were free from ambiguity, the overruling of a motion for a *venire de novo* was not erroneous, since such a motion reaches matters of form and can only be sustained when the findings are so defective and uncertain that no judgment can be rendered thereon.
City of Huntington v. Kaufman, 341, 344 (2).
113. *Findings.—Conclusions of Law.*—In an action for rentals due under a coal lease providing for a minimum annual rental, conclusions of law that the operator of the mine, as assignee of the lease, was primarily liable for the amount due, that as between the parties the original lessee became surety for the payment of such amount, and that the property of the operator should first be exhausted in satisfaction of the judgment before levying on the property of the original lessee, were not erroneous.
Vandalia Coal Co. v. Underwood, 91, 99 (8).
114. *Exceptions to Conclusions of Law.—Findings.*—For the purpose of their consideration, exceptions to conclusions of law stated by the trial court admit that the facts were fully and correctly found.
Fall Creek School Tp. v. Shuman, 232, 235 (1).
115. *Exceptions to Conclusions of Law.—Admissions.*—Exceptions to the trial court's conclusions of law, for the purposes of the appeal, concede that the facts are fully and correctly found.
Vandalia Coal Co. v. Underwood, 91, 96 (2).
116. *Findings.—Exceptions to Conclusions of Law.*—On appeal to the circuit court by a property owner from an assessment levied for street improvements, based upon the proposition that his property was not benefited in any sum, but that he was damaged in the sum of \$500, exceptions to conclusions of law stated by the trial court that his property was not benefited in any sum, that it was damaged in the sum of \$500, and that he should recover that amount from the city as damages, were not well taken, since such exceptions conceded that the facts were fully and correctly found.
City of Huntington v. Kaufman, 341, 343 (1).

APPEAL—Continued.

117. *Ruling on Motion to Retax Costs.*—Where there was no judgment for appellants on any issue involved, and no motion for any such judgment, no available error is presented on the overruling of a motion to retax costs.

Crawfordsville Trust Co. v. Ramsey, 40, 74 (16).

118. *Ruling on Motion for New Trial.*—Where the verdict was not contrary to law and there was evidence to support every material allegation of the complaint, the court did not err in overruling the motion for new trial urging that the verdict was contrary to law and not sustained by sufficient evidence.

Bess v. Morgan, 430, 433 (2).

119. *Ruling on Motion for New Trial.*—Where as a part of her motion for a new trial, on the ground that she had been surprised by the testimony of a certain witness, defendant submitted an affidavit that the witness, who had testified to hearing a conversation by defendant, had since the trial told her that she was not the woman he heard, and in opposition thereto, plaintiff produced the affidavit of the witness in which he stated that since the trial defendant had tried to induce him to say that he had never seen her before the trial, but that he did see her and did hear the conversation to which he had testified and that defendant's affidavit was false, the motion was properly refused upon that ground.

Kyger v. Stallings, 196, 202 (7).

120. *Motion for Judgment on Answers to Interrogatories.*—In reviewing the ruling on a motion for judgment upon answers to interrogatories, the court considers only the pleadings, interrogatories and answers, and the general verdict.

Patterson v. State Bank, etc., 331, 336 (2).

121. *Rulings on Defective Demurrers.*—Where the demurrer to an insufficient pleading is defective in form, the overruling of same will be justified on appeal on the ground that the trial court regarded such demurrer so defective as to present no question; but if such a demurrer has been sustained without objection to its form or substance, it will be regarded on appeal as sufficient to present the question of the sufficiency of the pleading, on the theory that it was so treated in the trial court.

Drebing v. Zahrt, 492, 495 (3).

(G) HARMLESS ERROR.

122. Where the findings of fact disclose that plaintiff failed to prove his case, questions on the overruling of demurrers to defendant's answers are immaterial.

Seigmund v. Williams, 498, 501 (2).

123. *Admission of Evidence.*—A voluntary and improper statement of plaintiff's wife, which was stricken out on motion, was not prejudicial.

Burford v. Dautrich, 384, 392 (10).

124. *Admission of Evidence.*—Error, if any, in admitting proper evidence on cross-examination, rather than in rebuttal, was a mere irregularity not warranting reversal.

Templer v. Lee, 433, 438 (3).

125. *Admission of Evidence.*—Although as a rule communications between a husband and wife are privileged, the action of the court in permitting the widow of an intestate to testify to some conversation with her husband with respect to his interest in a store operated in the names of intestate's son and another, whose names, with that of intestate, appeared upon the notes sued on, for the purpose of showing that intestate was principal and not

APPEAL—Continued.

surety on the notes in question, was neither harmful as to that issue where the finding was that intestate was merely surety, nor as to the principal issue involving the question of the authority of intestate's son to affix his father's name to the notes, where it appears that the verdict was in no way influenced thereby.

Patterson v. State Bank, etc., 331, 337 (6).

126. *Sustaining Demurrer to Answer.*—Error in sustaining a demurrer to a paragraph of answer is harmless, where all the evidence admissible thereunder was also admissible under another paragraph held good, and which averred the same facts more fully.

Taylor v. Griner, 617, 620 (3).

127. *Ruling on Demurrer to Answer.*—Overruling the demurrer to an answer, in an action under §2925 Burns 1908, §2403 R. S. 1881, to set aside the settlement of a guardian, averring that the cause of action did not accrue within either the five or six year period of limitation, was harmless, where the undisputed evidence, admitted without objection, shows that the settlement was made less than three years before the bringing of the suit.

Euler v. Euler, 547, 561 (15).

128. *Demurrer to Answer.*—Error, if any, in overruling a demurrer to defendant's answer alleging a rescission of the contract of sale of a traction engine for plaintiff's fraud in representing that the title was unincumbered, grounded on the proposition that such answer did not show by proper averments that defendant was injured by the alleged fraud, was rendered unavailable, where there was evidence received without objection showing injury by reason of such fraud, since the defect in the answer was such as could have been amended to conform to the evidence and must on appeal be deemed to have been so amended by virtue of §700 Burns 1908, §658 R. S. 1881.

A. D. Baker Co. v. Smedley, 79, 82 (5).

129. *Ruling on Demurrer to Complaint.*—Sustaining a demurrer to a paragraph of complaint, if error, is harmless, where another paragraph proceeds on the same theory and imposes no additional burden in the matter of proof.

McKinley v. Britton, 21, 24 (4).

130. *Ruling on Demurrer to Complaint.*—Where it appears from the jury's answers to interrogatories that the verdict was based upon a good paragraph of complaint, the error, if any, in the overruling of a demurrer to another paragraph is harmless.

Bess v. Morgan, 430, 432 (1).

131. *Determination of Error.—Ruling on Demurrer.*—The court on appeal may look to the special finding of facts to determine if the ruling on a demurrer to a paragraph of complaint was prejudicial error; and where a paragraph remains under which the evidence admissible under the paragraph held bad was introduced, and there was a special finding of facts and conclusions of law and judgment based on such paragraph, the error in sustaining such demurrer will be deemed harmless.

McKinley v. Britton, 21, 25 (5).

132. *Leave to Amend Complaint.—Variance.*—In an action on a note alleged to have been executed to J. S., where defendant at the time the note was offered in evidence objected on the ground of variance, claiming that the note was executed to Joseph S., and plaintiff, assuming that the objection was well taken, procured leave to amend the complaint, but before making the amendment learned that the note was in fact payable to J. S.

APPEAL—Continued.

and, without amending the complaint, reoffered and read the note in evidence, there was no variance between the pleading and proof and there was no error either in the granting of leave to amend or in plaintiff's failure to amend after leave granted.

Kyger v. Stallings, 196, 199 (2).

133. *Instructions*.—No harm resulted from the giving or refusing of instructions, where those given, taken as a whole, state the law correctly. *National Fire, etc., Co. v. Smith*, 124, 146 (20).

134. *Instructions*.—An instruction susceptible to a harmful inference is rendered harmless by other instructions which removed the possibility of such inference.

Louisville, etc., Lighting Co. v. Holsclaw, 85, 89 (5).

135. *Instructions*.—An instruction not open to the objection urged by appellant is not ground for reversal, although it is subject to an erroneous inference affecting the appellee.

Louisville, etc., Lighting Co. v. Holsclaw, 85, 89 (4).

136. *Instructions*.—Error in instructions as to the question of contributory negligence, and as to the duty of a pedestrian crossing a street railway track, was harmless, where the jury's answers to interrogatories negatived every charge of negligence contained in the complaint.

Nelson v. Chicago, etc., R. Co., 373, 374 (2).

137. *Instructions*.—An instruction, objected to as assuming certain facts, though loosely drawn in that respect, was not erroneous, where it appears from a consideration of all the instructions that the jury was not led to believe that the court had assumed any fact as true.

Cohen v. Reichman, 164, 169 (9).

138. *Instructions*.—Instructions subject to the objection that they required appellants to prove the averments of their counterclaim "by a preponderance of all the evidence in the cause," were harmless, in view of another instruction upon the burden of proof clearly stating that, in determining any fact or issue, the jury must reach its conclusion by considering only the evidence tending to establish such fact or issue and the evidence to the contrary.

Cohen v. Reichman, 164, 168 (6).

139. *Instructions*.—An instruction on the doctrine of last clear chance, even if open to the objections urged against it by appellants, was not harmful in view of answers to interrogatories affirmatively showing that the verdict does not rest on the doctrine of last clear chance.

Cleveland, etc., R. Co. v. Champe, 243, 250 (7).

140. *Instructions*.—An instruction objected to on the ground that it authorized the consideration of circumstances not shown by the evidence, was harmless when considered with other instructions clearly and definitely limiting the jury to the consideration of the facts and circumstances shown by the evidence.

Hall v. Grand Lodge, etc., 324, 330 (5).

141. *Instructions*.—Defendant, in an action for injuries to a servant by reason of unguarded cogs, was not harmed by an instruction which failed to state that as a prerequisite to a verdict for plaintiff the unguarded condition of the cogs must have been the proximate cause of the injury, even if such omission was error where the evidence was such that the jury could have reached no other result under a proper instruction.

Kingan & Co. v. Gleason, 684, 693 (11).

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142. *Instructions.*—In an action for the death of one killed at a railroad crossing, an instruction informing the jury that an absence of evidence on the subject of contributory negligence created the presumption that decedent was in the exercise of the degree of care required by law, though erroneous, was harmless, where the jury's answers to interrogatories show that the verdict rested on facts proven and not upon any presumption.
Cleveland, etc., R. Co. v. Champe, 243, 249 (5).
143. *Instructions.*—Although an instruction in a personal injury case was so drawn as to possibly leave the impression that if plaintiff had been injured in an accident prior to the one complained of, and settlement therefor had not been made, she could recover for such former injuries, its giving was harmless, in view of specific instructions stating that plaintiff could not recover for any former injuries and must recover, if at all, for the injuries alleged in her complaint.
Louisville, etc., Lighting Co. v. Holsclaw, 85, 89 (6).
144. *Instructions.*—In an action for a wrongful death an instruction on the measure of damages clearly and definitely limiting the recovery to pecuniary loss, was not erroneous although it contained an expression which standing alone might be construed as fixing an erroneous standard for measuring the damages, and especially was the defect harmless in view of other instructions clearly stating that there could be no recovery except on proof of loss or damage sustained by those for whom the action was brought.
Cleveland, etc., R. Co. v. Champe, 243, 251 (9).
145. *Instructions.*—The giving of an instruction that evidence of contradictory statements is not evidence of the truth or falsity of such statements but merely affects the credibility of the witness, objected to on the ground that where a party himself testifies contradictory statements made by him out of court may sometimes be proof of the facts involved in the statements, was not misleading or harmful, where the only contradictory statements introduced were those of plaintiff's witness, and not himself.
Wulschner-Stewart Music Co. v. Faulkner, 208, 212 (4).
146. *Instructions.*—Where appellants pleaded a counterclaim for damages resulting from their loss of credit by reason of the suit instituted against them by appellees, the error in an instruction stating that to prove such loss of credit "there must be direct evidence connecting the refusal of the credit with the bringing of the suit," was harmless, where such instruction, considered as a whole with the other instructions, could only mean to the jury that the fact of loss of credit must be directly connected with the bringing of the suit to form any basis for damages, and not that the jury was limited to any particular class of evidence.
Cohen v. Reichman, 164, 170 (10).
- 146a. *Instructions.*—In an action for the death of a servant, the giving of instructions that plaintiff need not prove every allegation in his complaint, but that it was sufficient if he proved some allegation of negligence, is harmless, where it appears from the jury's answers to interrogatories that the verdict for plaintiff was based on the defendant's negligence in furnishing a defective belt which decedent was attempting to place on a pulley, and other instructions were given relative to the condition of the belt, and informing the jury that there could be no recovery unless decedent was free from contributory negligence.
National Fire, etc., Co. v. Smith, 124, 145 (19).

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147. *Instructions*.—An instruction on the burden of proof relative to a counterclaim filed by appellants, which, when considered in its entirety, simply informed the jury that if appellees had proved the allegations of their complaint, the appellants, before entitled to a reduction of the amount of the claim, must have proved by a preponderance of the evidence that, because of appellees' refusal to perform their contract as alleged, they were damaged in one or more of the particulars enumerated in their counterclaim, was not fatally erroneous either on the ground that it required appellants to make their proof "by a preponderance of all the evidence in the cause," or on the ground that it deprived the appellants of the benefit of nominal damages if they proved a violation of the contract.
Cohen v. Reichman, 164, 168 (7).
148. *Refusal of Instructions*.—Requested instructions were properly refused, where, in so far as they were correct, they were fully covered by the instructions given.
Evansville Gas, etc., Co. v. Robertson, 353, 362 (11).
149. *Improper Argument*.—In an action by a servant for personal injuries, the effect of the statement "that little, mean, dirty insurance company", made by counsel for plaintiff in the argument, was cured by a prompt instruction from the court telling the jury that the language was improper and that it should not be considered.
Burford v. Dautrich, 384, 391 (8).
150. *Improper Argument*.—The statement "you may believe a witness if you want to", made by counsel for plaintiff in argument to the jury, though an incorrect statement, was not sufficiently prejudicial to warrant a reversal, where the jury was fully instructed as to the credibility of witnesses and the weight of testimony, and especially when considered in the light of the circumstances under which the statement was made as disclosed by the record.
Burford v. Dautrich, 384, 391 (9).
151. *Ruling on Motion to Submit Cause to Jury*.—Where a motion to submit the cause to a jury for trial was joint and asked the submission of all the issues to the jury, the overruling of same was not available error, even though the issue tendered by one paragraph of complaint was triable by jury, where another paragraph presented a cause of equitable cognizance.
McKinley v. Britton, 21, 28 (10).

(H) ERROR WAIVED.

152. *Waiver of Error*.—Alleged error is waived by appellant's failure to discuss same.
Hallagan v. Johnston, 509, 511 (1).
153. *Waiver of Error—Briefs*.—Alleged error in the ruling of a motion for new trial is waived by failure of the party asserting the error to set out the motion in its brief in compliance with Rule 22.
Vandalia R. Co. v. Upson Nut Co., 252, 258 (4).

(I) SUBSEQUENT APPEALS.

154. *Subsequent Appeal—Law of the Case—Incidental and Subsidiary Questions*.—Although, as to incidental questions that were not considered and decided on a former appeal, the decision is not conclusive or binding on the court on a subsequent appeal of the same case, where such subsidiary and incidental questions were necessarily involved and the decision could not have been reached in the absence of either an express or implied decision of such questions, the judgment on such former appeal rules the

APPEAL—Continued.

case throughout all its subsequent stages either in the *nisi prius* courts or courts of appellate jurisdiction.

Harmon v. Pohle, 439, 442 (2).

155. *Subsequent Appeal.—Law of the Case.—Sufficiency of Complaint.*—A former judgment on appeal rules the case on a subsequent appeal involving the same questions, so that where in the former opinion the court on appeal in holding the complaint sufficient said that its sufficiency depended “upon the construction of the lease made by appellee to appellant”, and then set out the portions of the lease pertinent to the questions under consideration, appellant on a subsequent appeal of the same case cannot urge the objection that the former appeal did not adjudicate the sufficiency of the complaint as against the objection that the lease was not properly made a part thereof, since that was a subsidiary question that was necessarily determined when the complaint was considered and held good.

Harmon v. Pohle, 439, 441 (1).

XI. DETERMINATION AND DISPOSITION OF CAUSE.**(A) AFFIRMANCE.**

156. *Presenting Questions Below.—Failure of Proof.*—A judgment will not be reversed for want of direct evidence to establish an essential fact which the jury may have inferred, where appellant failed to contest such fact at the trial.

Morris v. Reyman, 112, 118 (5).

157. *Review.—Disposition of Cause.*—Where it appears that substantial justice has been done in the trial court, the court on appeal will not disturb the judgment on alleged intervening errors not affecting the substantial rights of the parties.

Hall v. Grand Lodge, etc., 324, 331 (8).

158. *Review.—Insufficient Briefs.*—Appellant's failure to comply with the rules of the court in the preparation of his brief, to the extent that no question is presented, requires an affirmance of the judgment appealed from.

Fox v. Worm, 516, 517 (1).

159. *Review.—Merits Fairly Tried.*—Where it appears that the issues in a cause were fully and fairly tried out on the merits of the controversy, and that substantial justice has been attained, intervening errors will be deemed harmless and the judgment will be affirmed.

First Nat. Bank v. Ransford, 663, 668 (8).

APPLIANCES—

Latent defects in, see **MASTER AND SERVANT** 35.

Safety of machinery and, see **RAILROADS** 14.

Tools and, see **MASTER AND SERVANT** 28.

APPROPRIATION—

Allegation as to, see **SCHOOLS AND SCHOOL DISTRICTS** 2.

ARGUMENT OF COUNSEL—

Improper, see **APPEAL** 149, 150.

ASSESSMENTS—

Sewer, see **COVENANTS** 4.

ASSIGNMENT—

By husband to defeat wife's interest in estate, see HUSBAND AND WIFE 1.

Contracts Assignable.—Ratification.—Even if a contract for hoisting or dipping gravel to be used in road construction was of such character as to be nonassignable, where defendant made a payment to the assignee for gravel hoisted or dipped under such contract, he thereby recognizes assignee's right thereunder and was thereafter precluded from asserting that it was not assignable.
Todd v. Guffin, 605, 609 (1).

ASSIGNMENT OF ERRORS—

See APPEAL 3, 32-53.

ASSUMPTION OF RISK—

See MASTER AND SERVANT 1-10, 51.

ATTORNEY—

Service of notice on, to take deposition, see DEPOSITIONS 2.

ATTORNEY AND CLIENT—

Negligence.—The negligence of an attorney in failing to take proper steps to discharge a rule against his client to answer interrogatories is the negligence of the client.
Houser v. Laughlin, 563, 575 (11).

AUTHORITY—

Of agent, see PRINCIPAL AND AGENT 1.

Of foreman, see MASTER AND SERVANT 14.

BANKS AND BANKING—

Deposits.—Application on Debts Due Bank.—While a bank may have the right to apply deposits towards the discharge of a debt due it from the depositor, it is not obliged to do so.
Patterson v. State Bank, etc., 331, 339 (10).

BILL OF EXCEPTIONS—

See EXCEPTIONS, BILL OF.

BILL OF SALE—

As mortgage, see CHATTEL MORTGAGES 1.

BILLS AND NOTES—

1. *Defenses.—Gifts.*—In an action against plaintiff's former common law wife on a note executed by her in settlement of their affairs at the time of separation, defendant could not assert that the note was executed in consideration of interests which plaintiff had in her property by virtue of gifts from her and that she had an equitable claim on the property thus acquired by plaintiff, since if gifts were made she could not revoke them, and the property thus transferred became the property of plaintiff as absolutely as if he had purchased it.
Kyger v. Stallings, 196, 201 (5).

BILLS AND NOTES—Continued.

2. *Defenses.—Nondelivery.—Answer.—Sufficiency.*—In an action by the *bona fide* holder of a note against the makers, an answer alleging that the note was executed for the purchase price of a stallion, with the agreement that the price was to be divided into ten shares of the value of \$200 each of which one of the makers of the note was to take two shares and the remaining purchasers, including the other defendants, were to take one share each, that each purchaser should be liable on the note only to the amount represented by his share, that the note was not to be delivered or become effective until signed by all the purchasers, that the defendants signed the note but that the other purchasers did not sign it or pay their share, that defendants demanded a return of the note as soon as they discovered payee's possession, and that it was never delivered to the payee, did not proceed upon the theory that the execution was never completed by any delivery, but upon the theory that there was no valid delivery because possession was acquired before the note was signed by all the shareholders, and was insufficient to constitute a defense to the action.
Bombolaski v. First Nat. Bank, 172, 187 (6).
3. *Delivery.—Effect.*—While as a general rule, as between the original parties, the delivery of a negotiable instrument involves not only a change of possession, but also an intent on the part of the one making the delivery that the instrument shall by that act become effective, where the maker of such an instrument through negligence or misplaced confidence permits it to be in the possession of the payee so as to enable him to place it in circulation, the delivery is effective after the instrument has reached the hands of a *bona fide* holder, regardless of the maker's intention at the time of parting with the possession.
Bombolaski v. First Nat. Bank, 172, 189 (8).
4. *Delivery.—Negligence of Makers.*—Where a negotiable note given for the price of a stallion was not to be delivered until nine persons having shares in the horse had signed it, but the payees were permitted to have possession of the note before it had been signed by all the shareholders, and were thus enabled through the negligence of the makers to transfer it to a *bona fide* holder for value, when it was signed by only six of the shareholders, the makers were not entitled to urge want of delivery as a defense in an action thereon and the court did not err in sustaining demurrers to their answers setting up such defense.
Bombolaski v. First Nat. Bank, 172, 182 (5).
5. *Execution.—Delivery.*—Delivery is the final step in the execution of a note, and the issue of its nonexecution can be raised only by an answer of *non est factum*, so that in an action where the notes involved were in plaintiff's possession and were introduced in evidence without objection, and there was no issue formed respecting their execution, the special finding of facts was not insufficient for failure to include a specific finding that the notes in suit were delivered.
Guyer v. Union Trust Co. 472, 491 (14).
6. *Place of Execution.—Presumptions.*—A note bearing date as of a certain time and place within the State, will be presumed in an action thereon to have been executed in the State.
Bombolaski v. First Nat. Bank, 172, 175 (1).
7. *Negotiability.*—The question of negotiability or nonnegotiability of a note is one of construction or interpretation to be determined from the form and conditions of the instrument in view of the law subject to which it was made, and, since the quality

BILLS AND NOTES—Continued.

and character of a note as to being negotiable or nonnegotiable attaches at the time and place of its inception and remains impressed upon it throughout its existence, the negotiability or nonnegotiability of a note in the state or country of its legal origin cannot be changed or affected by the subsequent transmission of such note to another jurisdiction.

Bombolaski v. First Nat. Bank, 172, 178 (3).

8. *Negotiability.—Determination.*—The negotiable or nonnegotiable quality of a note depends upon the law subject to which it was made, and in arriving at a determination of the question whether it is subject to the law of a jurisdiction other than that in which it was executed, or to the law of the place where executed, the intent of the parties as expressed in the obligation will control, and the provision in a note for its payment at a place outside the jurisdiction in which it was executed gives rise to the presumption that the parties intended its negotiability to be controlled by the law of the jurisdiction in which it was made payable while a failure to specify a place of payment warrants the presumption that it was payable in the jurisdiction where executed, and its quality will be determined by the law of that place.

Bombolaski v. First Nat. Bank, 172, 178 (4).

9. *Negotiability.—Note Payable in Another State.*—The negotiability of a note executed in this State, and by its terms made payable in another, must be determined by the law of the state where payable, hence a note executed in this State and made payable at a place in Illinois, which was negotiable by the law of that state, must be treated as negotiable in an action thereon in this State, although it does not conform to the standard of negotiability fixed by the statute of this State; and, being in the hands of a *bona fide* holder, it was not subject to defenses existing against the payee. (*Mix v. State Bank* [1859], 13 Ind. 521; *Patterson v. Carrell* [1877], 60 Ind. 128; *Fordyce v. Nelson* [1883], 91 Ind. 447; *Midland Steel Co. v. Citizens Nat. Bank* [1901], 26 Ind. App. 71; *Garrigue v. Kellar* [1905], 164 Ind. 676; and *Ray v. Baker* [1905], 165 Ind. 74, distinguished.)

Bombolaski v. First Nat. Bank, 172, 175 (2), 178 (2).

10. *Non Est Factum.—Evidence.—Sufficiency.*—In an action on a note, where defendant, who pleaded *non est factum*, admitted the execution of a note to plaintiff, but claimed that the note introduced at the trial was not the note she executed, and plaintiff testified without qualification that it was, and the evidence showed that the note defendant admitted signing was drawn by a banker, who testified that the note in evidence was prepared by him and signed by defendant, and defendant also identified the signature as her own, the execution of the note sued on was sufficiently established.

Kyger v. Stallings, 196, 200 (3).

11. *Notes Between Husband and Wife.—Payment.—Resumption of Marital Relations.*—In an action against plaintiff's former common law wife on a note executed by her in settlement of their affairs at the time of separation, where there was evidence showing that the parties did not consider the note as paid by their subsequent resumption of the relation of husband and wife, and that the reconciliation took place at defendant's request, the decision for plaintiff was supported by the evidence, and was not contrary to law on the theory that under the evidence the note was paid as a matter of law by virtue of the reconciliation.

Kyger v. Stallings, 196, 201 (6).

BILLS AND NOTES—Continued.

12. *Payment.—Evidence.—Mistake.*—While the delivery to plaintiff of checks in a certain sum in payment of a note for less sum, and his acceptance thereof for the purpose of satisfying such note out of the proceeds of the checks, constituted *prima facie* a payment of the note and a discharge of the debt, where it appeared that plaintiff, by mistake in deducting the amount of the note from the amount of the checks, paid defendant a greater sum than the balance due him, there was no actual payment of the note so as to prevent a recovery of the amount overpaid to defendant, since to constitute such payment the defendant was bound to allow the sum due on the note to remain with plaintiff, and, even though plaintiff's failure to retain the correct sum was caused by his own error, it was defendant's duty to correct the mistake. *Morris v. Reyman*, 112, 115 (3).
13. *Validity.—Adultery.—Evidence.*—Although a note given in consideration of future illicit intercourse is void, where the evidence in an action on a note showed that plaintiff and defendant had lived together for a long time as common law husband and wife, each believing that the wife was legally divorced from her former husband until about the time the note was executed, and showed that the note was executed at a time when they were about to separate, in settlement of financial matters between them, it cannot be urged, in the absence of evidence that it was in consideration of future illicit intercourse, that the note was void as being a contract between persons living in adultery. *Kyger v. Stallings*, 196, 200 (4).
14. *Value.—Interest.—Pleading.*—A promissory note is *prima facie* worth the specified amount, so that in view of the fact that its interest value is a mere matter of mathematical calculation, an allegation of the amount of a note is sufficient to show its value as a matter of pleading. *First Nat. Bank v. Ransford*, 663, 667 (5).

BOARD OF COUNTY COMMISSIONERS—

Liability as to letting contract, see COUNTIES.

BONA FIDE PURCHASERS—

See DEEDS 5; VENDOR AND PURCHASER 1, 2.

BONDS—

See INJUNCTION 1-4.

Failure to fix the amount of the appeal, see APPEAL 29.

Construction.—Words Descriptio Personae.—Although words that are merely *descriptio personae* will be disregarded as surplusage, there are cases relating to public corporations, to banks and to contracts, that are in the nature of exceptions to the rule, where it appears that the words were not used as merely descriptive of the person, and that the obligation or benefit is not personal.

Crawford v. Spindler, 1, 9 (5).

BREACH—

See CONTRACTS 1.

Of contract, see COUNTIES.

Of warranty see COVENANTS 1-3.

BURDEN OF PROOF—

See FENCES; GIFTS 1; JUDGMENT 8; MASTER AND SERVANT 18; NEGLIGENCE 3; QUIETING TITLE 1; REFORMATION OF INSTRUMENTS 1, 2; TRIAL 6, 7, 28; VENDOR AND PURCHASER 5.

BRIEFS—

See APPEAL 7, 11-13, 15-18, 36, 37, 54-66, 83, 100, 153.

Insufficient, see APPEAL 158.

BUILDING AND LOAN ASSOCIATIONS—

1. *Statutes.—Construction.*—The fact that §13 of the act of 1911 (Acts 1911 p. 390), relating to the withdrawal of members from building and loan associations, provides that a nonborrowing member shall give three months' notice of his intention to withdraw, does not justify or warrant an association to obligate borrowing members to give notice of their intention to exercise the right secured to them by said section to pay off their loans and withdraw at any time, since the object requiring notice in the case of nonborrowers is to afford the association time and opportunity to procure funds to meet the demands, and no such necessity can exist in the case of withdrawal by a borrowing member.
Adams v. Union Nat. Sav., etc., Assn., 676, 682 (3).

2. *Repayment of Loan.—Statutes.—Public Policy.*—In view of the fact that from the time of earliest legislation on the subject of building and loan associations various statutes have provided that borrowing members could pay off their loans and withdraw their membership at any time before maturity by paying the amount due with interest, charges and fines, if any, and in view of the chief purpose for authorizing such associations, the right of a borrowing member to thus pay off his loan at any time must be deemed a part of the public policy of the State; hence any provision in the by-laws of such an association, or in the mortgage executed by a borrower whereby such borrower waives the right secured to him by §13 of the act of 1911 (Acts 1911 p. 390), to at any time repay his loan and withdraw from the association, is void as against public policy.
Adams v. Union Nat. Sav., etc., Assn., 676, 678 (1), 679 (1), 682 (1), 683 (1).

CANCELLATION OF INSTRUMENTS—

- Ejectment.—Quieting Title.—Invalidity.—Remedy.*—The heirs of a deceased grantor, after disaffirming her deed on the ground of fraud, could treat the conveyance as avoided by such disaffirmance and sue in ejectment or to quiet title or proceed in equity to have the conveyance cancelled and the title reinvested in them as the heirs of such deceased grantor, and could in one action pursue each of such courses by separate paragraphs of complaint.
McKinley v. Britton, 21, 27 (7).

CARRIERS—

1. *Conversion of Freight.—Evidence.—Sufficiency.*—Evidence showing that a carload of iron was received by defendant railroad company to be delivered to the codefendant, that the delivery of the car required the placing of same in the yard of codefendant beyond a gate which was maintained across the switchtrack, the key to which was kept by codefendant, that the car was placed upon the track outside the gate on Friday, was checked by an employe of defendant as inaccessible on Saturday, and removed as empty on Monday, that the purported receipt of codefendant for the car was signed by defendant's conductor, who gave no notice to codefendant that the car was on the siding, that the car never passed within codefendant's gate and that it was never unloaded by codefendant, though failing to show what was the

CARRIERS—Continued.

actual disposition made of the iron, while amply sufficient to show a nondelivery of the iron, does not support a finding that it was converted by defendant railroad company.

Vandalia R. Co. v. Upson Nut Co., 252, 255 (3).

2. *Failure of Delivery.—Conversion.*—A mere nondelivery by a common carrier does not constitute a conversion, but a misdelivery may. *Vandalia R. Co. v. Upson Nut Co.*, 252, 255 (2).

3. *Injuries to Passenger.—Instructions.—Measure of Damages.*—An instruction informing the jury that if it found for plaintiff, who was injured while a passenger on defendant's car, she could only recover for such damages as the evidence relating to damages showed she was entitled to recover for the injuries described in her complaint, not exceeding the amount therein demanded, which sum should fully and fairly compensate her for the injuries, if any, she had so received, was not open to the objection that it authorized the jury in assessing the damages to consider injuries due to a former accident for which defendant had settled adversely. *Louisville, etc., Lighting Co. v. Holsclaw*, 85, 88 (3).

4. *Injuries to Passengers.—Negligence.—Instructions.*—In a passenger's action against an electric railroad company for personal injuries, where the first paragraph of complaint charged negligence as to the condition of the track, and the second charged negligence in the operation of the car, an instruction that if plaintiff was injured without her fault while a passenger on said car "which was derailed by reason of the manner in which it was operated and propelled," though the "derailment might not have occurred in the manner described in the first paragraph of complaint, nevertheless, a presumption of negligence arises against the defendant," to rebut which the defendant must show by a fair preponderance of the evidence that the "derailment could not have been avoided by the exercise of the highest degree of practical care and diligence," was not limited to the first paragraph, and was a correct statement of the law.

Louisville, etc., Lighting Co. v. Holsclaw, 85, 87 (2).

CASES—**DISTINGUISHED:**

Baldwin v. Burrows, 95 Ind. 81, see *Shore v. Ogden*, 394, 395 (1), 396 (1).

Board, etc., v. Senn, 117 Ind. 410, see *Cincinnati, etc., R. Co. v. Wayne Tp.*, 533, 537 (2).

Dubois v. Board, etc., 10 Ind. App. 347, see *Cincinnati, etc., R. Co. v. Wayne Tp.*, 533, 537 (2).

Evansville, etc., R. Co. v. Hays, 118 Ind. 214, see *Cincinnati, etc., R. Co. v. Wayne Tp.*, 533, 537 (2).

Fordyce v. Nelson, 91 Ind. 447, see *Bombolaski v. First Nat. Bank*, 172, 175 (2), 178 (2).

Garrigue v. Kellar, 164 Ind. 676, see *Bombolaski v. First Nat. Bank*, 172, 175 (2), 178 (2).

Ludlow v. Colt, 41 Ind. App. 138, see *Pabst Brewing Co. v. Schuster*, 375, 379 (1), 380 (1).

Midland Steel Co. v. Citizens Nat. Bank, 26 Ind. App. 71, see *Bombolaski v. First Nat. Bank*, 172, 175 (2), 178 (2).

Mix v. State Bank, 13 Ind. 521, see *Bombolaski v. First Nat. Bank*, 172, 175 (2), 178 (2).

CASES—Continued.

Patterson v. Carrell, 60 Ind. 128, see *Bombolaski v. First Nat. Bank*, 172, 175 (2), 178 (2).

Ray v. Baker, 165 Ind. 74, see *Bombolaski v. First Nat. Bank*, 172, 175 (2), 178 (2).

Shipman Coal Co. v. Pfeiffer, 11 Ind. App. 445, see *Shore v. Ogden*, 394, 395 (1), 396 (1).

CAUSA MORTIS—

See GIFTS 5.

Gifts, see HUSBAND AND WIFE 8.

CERTIFICATE—

Of acknowledgment, see ACKNOWLEDGMENTS.

CESTUI QUE TRUST—

See TRUSTS 1, 3.

CHANGE OF VENUE—

See VENUE 1, 2.

When judgment was taken against defendant by default pending a ruling on his motion for a, from the county, a ruling on such motion is unnecessary, see JUDGMENT 2.

CHATTEL MORTGAGES—

1. *Absolute Bill of Sale as Mortgage.—Evidence.*—Evidence showing that at the time of the execution of a bill of sale to plaintiff, absolute on its face, for sixteen stacks of hay, the person who executed same was indebted to plaintiff in a sum equal to the amount specified as the purchase price, that plaintiff had never seen the hay, that its total value was much greater than the specified purchase price, that the hay was purchased by plaintiff "to satisfy purchase money" to the amount specified, was sufficient, in the absence of any showing that plaintiff had ever taken either actual or constructive possession, to warrant the finding that the instrument was simply a chattel mortgage to secure a preëxisting debt. *Wolf v. Russell*, 660, 661 (1).
2. *Evidence.—Execution.—Presumptions.*—The execution of a chattel mortgage is completed by delivery, and while, in the absence of a showing to the contrary, such an instrument will be presumed to have been executed on the day of the date it bears, it is always permissible to show the true date of execution, and to that end to show when it was delivered, even though the date thus established is different from the date which it bears on its face. *Guyer v. Union Trust Co.*, 472, 488 (11).
3. *Failure to Record.—Possession of Chattels.—Rights of Mortgagee.*—Failure to record a chattel mortgage rendered it invalid as against a third person who purchased the property covered thereby, and, as against him, such mortgage was insufficient to give the mortgagee any right of possession. *Wolf v. Russell*, 660, 662 (2).
4. *Invalid Certificate of Acknowledgment.—Effect of Recording.*—Where a chattel mortgage was not admissible to record because not bearing a proper certificate of acknowledgment, it was valid only as between the parties, and the recording of same within

CHATTEL MORTGAGES—Continued.

ten days after its execution could not extend its efficacy so as to affect even those having actual notice.

Guyer v. Union Trust Co., 472, 486 (5).

5. *Property Covered.—Evidence.*—Evidence showing that a chattel mortgage covered a certain sorrel horse, seven years old, weighing about 1,200 pounds and named "Charley", that a subsequent mortgage by the same mortgagor to another person described a sorrel horse eight years old, named "Barney", that the "Charley" horse had no marks, that "Barney" had certain marks, and that the horse purchased by plaintiff of the mortgagor at a public auction was a sorrel horse named "Barney," was sufficient to support a judgment for plaintiff in an action, for the conversion of his horse, against defendant who had taken the horse on execution under a judgment for replevin of the property covered by the first mortgage.

Hallagan v. Johnston, 509, 514 (5).

CHATELS—

Identity of mortgaged, see EVIDENCE 10.

CHECKS—

When acceptance of check will operate as a discharge of the debt in full, see ACCORD AND SATISFACTION 2.

"CHILD"—

See WORDS AND PHRASES.

Neglect of, see PARENT AND CHILD.

Loss of service on account of injury to, see DAMAGES 3.

"CHILDREN"—

See WORDS AND PHRASES.

CLAIMS—

See EVIDENCE 3.

COAL—

Lease, see MINES AND MINING 1, 2.

Construction of, lease, see MINES AND MINERALS 4.

CODIFICATION—

Authority of, commissioners, see STATUTES 1.

COMMISSION—

Contracts, see WORK AND LABOR.

COMMON COUNCIL—

Powers of, see MUNICIPAL CORPORATIONS 4.

COMPLAINT—

See PLEADING 5-13.

CONCEALMENT—

By guardian, see GUARDIAN AND WARD 11.

CONCLUSIONS—

See MASTER AND SERVANT 15, 16.

CONCLUSIVENESS—

See APPEAL 111; EVIDENCE 4; JUDGMENT 1.

CONCLUSIONS OF LAW—

See TRIAL 29-32.

CONDITIONAL LIMITATIONS—

See DEEDS 2, 3.

CONDITIONS—

Waiver of, precedent, see PLEADING 12.

CONDITIONS SUBSEQUENT—

See DEEDS 1.

CONSTRUCTION—

See BONDS; BUILDING AND LOAN ASSOCIATION 1; MORTGAGES 1
STATUTES 2, 3.

Of assignment of errors, see APPEAL 33.

Of contract, see CONTRACTS 2-5.

Of deed, see DEEDS 3.

Of bond, see INJUNCTION 3, 4.

Of lease, see LANDLORD AND TENANT 1.

Of railroad, see MASTER AND SERVANT 4.

Of oil and gas leases, see MINES AND MINERALS 1-3.

Of will, see WILLS 1.

CONTRACTS—

See REFORMATION OF INSTRUMENTS 1, 2; SCHOOLS AND SCHOOL DISTRICTS 5, 7.

Assignable, see ASSIGNMENT.

Breach of, see COUNTIES.

Of suretyship, see EXECUTORS AND ADMINISTRATORS 2.

Commission, see WORK AND LABOR.

1. *Contract for Repurchase of Stock Certificate.—Breach.—Complaint.—Sufficiency of Demand.*—In an action on a contract to repurchase a certificate of stock sold to plaintiff, a complaint showing that plaintiff was at all times ready and willing to transfer such certificate to the defendants on payment by them of the amount due under the contract, and that defendants had been requested to carry out the contract and had refused, showed a sufficient compliance on plaintiff's part, since the refusal of defendants to carry out the contract excused plaintiff from the necessity of a formal tender. *Newman v. Horner*, 298, 301 (3).
2. *Construction.*—As a rule, where the terms of a contract are of doubtful or ambiguous meaning, the construction given and acted upon by the parties themselves in respect to same, will be adhered to by the court. *Patterson v. State Bank, etc.*, 331, 335 (1).
3. *Construction.*—While extraneous matter may be considered where a contract is ambiguous, for the purpose of ascertaining and effectuating the original intention of the parties, the court cannot make a new contract for them, but must, in the absence of fraud, give effect to the contract actually entered into. *Vandalia Coal Co. v. Underwood*, 91, 98 (6)
4. *Construction.*—Where the language employed expresses a definite meaning involving no absurdity or contradiction between

CONTRACTS—Continued.

different parts of an instrument, the court will not resort to extrinsic facts to arrive at the intention of the parties, but will give effect to the meaning apparent from the language employed.

Vandalia Coal Co. v. Underwood, 91, 97 (4).

5. *Construction.—Authority to Sign Note.*—In an action on notes signed in the names of defendant's intestate, his son and his son's partner, where plaintiff claimed that the son was authorized to affix intestate's name to the notes by virtue of a writing providing that intestate, his son and his son's partner would stand together in support of the firm and that "we grant the right of our names to be used jointly and to be signed by either one" of the parties, answers by the jury to interrogatories that intestate authorized the signing of his name to the notes in suit and that his name was signed by his son, show that the parties themselves construed the writing to mean that intestate's son had authority to sign his father's name to such notes.

Patterson v. State Bank, etc., 331, 337 (4).

6. *Leases.—Enforcement.*—An unambiguous lease or contract will be interpreted and enforced according to the plain meaning of its provisions, where nothing is shown that changes the rights of the parties as therein expressed.

Dittman v. Keller, 448, 451 (2).

7. *Performance of Condition.—Tender.—Sufficiency of Complaint.*—As a general rule a tender to be sufficient must be unconditional, but where there are conditions precedent to be performed by the other party, or where there are mutual and dependent obligations to be performed, the tender may be sufficient though conditioned on performance by the party to whom it is made, of the obligations resting on him, hence a complaint for breach of a contract to repurchase a stock certificate held by plaintiff was not open to the objection that it showed an insufficient tender, and that plaintiff's offer to assign the stock was accompanied by a demand for more than was due, where its averments showed that the transfer of the stock to defendants was dependent on payment therefor by them according to the terms of the contract, and that an offer was made by plaintiff to transfer the stock to defendants conditioned only on the payment of the amount due him.

Newman v. Horner, 298, 302 (4).

8. *Rescission.—Fraud.*—To justify rescission on the ground of fraud, it must appear, among other things, that there was misrepresentation as to a material matter constituting an inducement to the contract, and that the party rescinding was injured thereby.

A. D. Baker Co. v. Smedley, 79, 81 (3).

9. *Validity.—Fraud.—Sales.*—A contract is voidable *ab initio* for fraud, where, but for the fraudulent representations, the party would not have been induced to enter into it; hence the purchaser of a traction engine, who relied on the seller's representation that the title was unincumbered, on discovering that such representation was false, could rescind the entire contract for the fraud practiced upon him and thereby prevent the seller from obtaining any advantage on account of the fraud and deception.

A. D. Baker Co. v. Smedley, 79, 81 (2).

CONTRIBUTORY NEGLIGENCE—

See MASTER AND SERVANT 9-13, 51; NEGLIGENCE 2-6; RAILROADS 2-4; STREET RAILROADS 2-6.

CONVERSION—

Of freight, see **CARRIERS** 1, 2.

1. *Actions.—Evidence.—Sufficiency.*—In an action for the conversion of a piano, evidence showing that the piano was purchased by plaintiff when his daughter was a schoolgirl, that after her marriage plaintiff made his home with her most of the time and that she continued to use the piano, that in the absence of plaintiff she traded the piano to defendant for a player piano, that plaintiff had never parted with the title to his daughter or to any one else, that at the time of the trade defendant's agent was informed the piano belonged to plaintiff, that plaintiff never acquiesced in or consented to the trade, and after demand, sued for the conversion of the piano, which defendant in the meantime had sold, was sufficient to support a verdict and finding for plaintiff. *Wulschner-Stewart Music Co. v. Faulkner*, 208, 210 (1).
2. *Acts Constituting.*—Where one receives the money of another, with directions to apply it to the payment of a debt owing by the latter to a third person, and in disregard of such directions applies the same to his own or some other use, such use is wrongful and amounts to a conversion of the money so applied. *First Nat. Bank v. Ransford*, 663, 665 (2).
3. *Acts Constituting.*—A conversion implies some affirmative wrongful act in the disposition of the thing converted, or in withholding it from the rightful owner, that is, there must be a wrongful taking or detention, or an illegal use, misuse, or assumption of ownership, and a mere nonfeasance or failure to perform a duty imposed by contract or implied by law is not conversion. *Vandalia R. Co. v. Upson Nut Co.*, 252, 254 (1).
4. *Complaint.—Demand.*—A complaint for the conversion of money or property is sufficient without alleging a demand before suit, where the facts alleged show an actual conversion. *First Nat. Bank v. Ransford*, 663, 665 (3).
5. *Complaint.—Sufficiency.*—The essence of conversion is the wrongful invasion of one's property right by another, and while there can be no such invasion where the latter's possession was rightfully obtained, except upon demand for possession by the former and refusal by the latter, a complaint which averred that plaintiff sold a note and mortgage to defendant with specific directions that the proceeds should be applied to the payment of a certain debt owing by plaintiff, and that defendant subsequently disregarded such directions and applied the money to the payment of the debt of another without plaintiff's knowledge or consent, charged an actual conversion and was sufficient without alleging demand although possession in the first instance was rightfully acquired by defendant. *First Nat. Bank v. Ransford*, 663, 666 (4).
6. *Evidence.—Damages.*—In an action for damages for the conversion of a piano, where the evidence as to the value of the piano was conflicting and ranged from \$75 to \$200, the court cannot say as a matter of law that a verdict for \$150 was excessive. *Wulschner-Stewart Music Co. v. Faulkner*, 208, 212 (5).
7. *Evidence.—Sufficiency.*—In an action against a bank for the conversion of the proceeds of a note and mortgage purchased from plaintiff, evidence showing that plaintiff sold same to defendant with directions to apply the proceeds to a certain purpose, though conflicting, together with undisputed evidence that the amount had been credited on a debt owing to defendant from

CONVERSION—Continued.

plaintiff's husband, and that plaintiff had thereafter unsuccessfully demanded the amount of the note and interest, was sufficient to warrant a verdict for plaintiff.

First Nat. Bank v. Ransford, 663, 667 (7).

CONVEYANCES—

See HUSBAND AND WIFE 2.

CORPORATIONS—

1. *Officers and Directors.—Liability.*—Officers or directors of a corporation may be personally liable for acts which are also torts of the corporation.

Hartzler v. Goshen, etc., Ladder Co., 455, 471 (18).

2. *Liability of Stockholders.—Torts of Corporation.*—A stockholder, who is not an officer of the corporation and in no way connected with the management of its business, cannot, as a general rule, be held personally liable for its torts.

Hartzler v. Goshen, etc., Ladder Co., 455, 471 (19).

COSTS—

Determination of, see APPEAL 69.

Judgment for, see APPEAL 21.

Ruling on motion to retax, see APPEAL 117.

COUNTERCLAIM—

See PLEADING 16; QUIETING TITLE 2; REPLEVIN 4, 5.

COUNTIES—

Boards of County Commissioners.—Liability.—Breach of Contract.

—In the letting of a contract for the construction of a highway, the board of county commissioners represents the sovereign power of the State, and is not liable in damages in reference to such contract.

Modlin v. Board, etc., 239, 241 (1).

COURTS—

Jurisdiction.—Statutes.—Courts cannot assume jurisdiction where it is not conferred, but are bound by valid statutes the same as individuals, nor can they arbitrarily ignore the rules of practice.

Jenkins v. Steele, 11, 20 (10).

COVENANTS—

1. *Breach of Warranty.—Notice.—Necessity.*—However desirable it may be that written notice should be given of the breach of a covenant of warranty, there is no necessity therefor as a condition precedent to recovery on the warranty, where the warrantor knew of the defect in the title and that the title was being assailed, and refused to assist in protecting the grantee.

Sarrls v. Beckman, 638, 641 (1).

2. *Warranty.—Breach.—Eviction.*—While the grantee in possession under a warranty deed, until evicted, can recover only nominal damages from his grantor because of a defect in the title, a grantee, who, while in possession, on being subjected to trouble because of a defect in his title, brought an action to have his title quieted in which judgment was recovered against him in a large amount, could recover actual damages from the grantor, since the judgment against him amounted to an eviction.

Sarrls v. Beckman, 638, 641 (2), 643 (2).

COVENANTS—Continued.

3. *Warranties.—Breach.*—A recovery for breach of a covenant of warranty cannot be defeated on the ground that if grantee had remained silent the defect in the title would not have been discovered and the persons profiting by the defect would eventually have been barred by the statute of limitations, since a party cannot be required to hold property for the full period of limitation before he attempts to dispose of it or perfect his title.
Sarria v. Beckman, 638, 642 (3).
4. *Warranties Against Incumbrances.—Sewer Assessment.*—A lien for a sewer assessment, growing out of the construction of a sewer after the execution of a contract for the sale of real estate, and prior to the execution of a deed pursuant to such contract, is not covered by the covenants of warranty in such deed.
Kimberlin v. Templeton, 155, 161 (3).
5. *Warranties Against Incumbrances.—Scope.*—Although a lien created solely by operation of law after the execution of a contract for the sale of real estate is not embraced in the covenants of warranty in the deed subsequently executed pursuant to such contract, such lien, having attached, would be covered by the warranties in a deed executed by such vendee on his conveyance of such real estate. *Kimberlin v. Templeton*, 155, 163 (4).

CROSS-EXAMINATION—

See WITNESSES 2.

CROSSINGS—

Accidents on, see RAILROADS 1-13.

DAMAGES—

See APPEAL 94; CONVERSION 6; SALES 3; TRADE-MARKS AND TRADE-NAMES 13.

Action for, see WATERS AND WATERCOURSES.

1. *Failure to Award Nominal Damages.—Appeal.*—A judgment will not be reversed solely for a refusal to assess nominal damages.
Cohen v. Reichman, 164, 169 (8).
2. *Exemplary Damages.—Determination.*—Exemplary damages is a sum assessed in addition to compensatory damages, and the amount that may be assessed as exemplary damages rests in the sound discretion of the jury, or of the court where the court tries the facts. *American Sand, etc., Co. v. Spencer*, 523, 532 (9).
3. *Injury to Child.—Loss of Service.*—In an action by a parent for injuries to his child, the measure of damages is the value of any services which the evidence shows that plaintiff has lost and will probably lose during the minority of the child as a result of such injuries, or any diminution of the value of such services which the evidence shows has resulted or will probably result therefrom during such period, less the reasonable cost of its support and maintenance.
Indianapolis Traction, etc., Co. v. Croly, 543, 545 (2).

DANGER—

Knowledge of, see MASTER AND SERVANT 5.

DEATH—

1. *Actions.—Measure of Damages.*—In an action under §285 Burns 1908, Acts 1899 p. 405, for a wrongful death, the damages are limited to the pecuniary loss suffered by the widow or next of kin for whose benefit the suit is maintained.
Cleveland, etc., R. Co. v. Champe, 243, 251 (8).
2. *Actions.—Complaint.—Existence of Beneficiaries.*—A complaint against a railroad company alleging the names of decedent's children and that decedent's death was caused by the negligence of defendant's servants in charge of the engine which struck her is not affected by the allegation that "plaintiff is entitled to recover for and on behalf of the estate", but is within §285 Burns 1908, Acts 1899 p. 405, providing that an action to recover for the wrongful death of another must be brought by the personal representative of the decedent for the benefit of the widow and children, if any, or next of kin, and is sufficient without alleging that such children were dependent on decedent for their support.
Cleveland, etc., R. Co. v. Champe, 243, 246 (2)
3. *Excessive Damages.*—A verdict in an action for a wrongful death will not be set aside on the ground that the damages awarded are excessive, where it cannot be said from the evidence that the amount was excessive, although it appears to have been liberal.
Cleveland, etc., R. Co. v. Champe, 243, 252 (10).

DEEDS—

As security, see MORTGAGES 2.

Construction of trust, see TRUSTS 7.

Tax, see TAXATION 8, 9.

1. *Conditions Subsequent.—Effect.*—The title to property conveyed upon a condition subsequent does not vest in subsequent grantees of the original grantor upon the happening of the condition, or abandonment of the property, but vests in such grantor or his heirs upon a proper reëntry.
Fall Creek School Tp. v. Shuman, 232, 236 (2).
2. *Conditional Limitations.—Effect.*—Under a deed conveying property subject to a conditional limitation, upon the determination of the estate, the title vests *ipso facto*, and passes to one at the time holding under a subsequent deed from the original grantor.
Fall Creek School Tp. v. Shuman, 232, 236 (3), 237 (3).
3. *Construction.—Conditional Limitation.*—A deed must be construed as a whole and the grantor's intention must control, hence a deed conveying property to the trustees of a school corporation and their successors in office forever, "so long as the same is used for school purposes", when considered in connection with the surrounding circumstances, the situation of the parties, and the condition of the parties, created an estate with a conditional limitation, so that the estate held by such school corporation vested *ipso facto*, on the abandonment of the school, in one who at the time held title under a later conveyance from the original grantor.
Fall Creek School Tp. v. Shuman, 232, 237 (5).
4. *Quitclaim Deed.—Effect.*—Except in so far as the grantee in a quitclaim deed may be protected by the recording act, the effect of such a deed is limited to the estate or interest held by the grantor at the time of its execution.
Sullenger v. Baecker, 365, 371 (7).

DEEDS—Continued.

5. *Title of Vendor.—Bona Fide Purchaser.—Statutes.*—The grantee in a quitclaim deed from one who had been divested of his rights and interest by sale in bankruptcy proceedings took no title unless he was at the time a good faith purchaser for a valuable consideration within the meaning of §3962 Burns 1908, §2931 R. S. 1881. *Sullenger v. Baecher*, 365, 370 (5).

DEFAULT—

See JUDGMENT 2-7.

Where judgment was taken against defendant by, pending a ruling on his motion for a change of venue from the county, a ruling on such motion is unnecessary, see JUDGMENT 2.

DEFECTS—

Latent, see MASTER AND SERVANT 43.

DELIVERY—

Of negotiable instrument, see BILLS AND NOTES 3-5.

DEMAND—

See CONVERSION 4.

Sufficiency of, see CONTRACTS 1.

DEMURRER—

See PLEADING 16, 18.

DEPOSITIONS—

1. *Motions to Suppress.*—A motion to suppress a deposition should be made before the submission of the cause for trial.
Cohen v. Reichman, 164, 167 (2).
2. *Service of Notice.—Service on Attorney.*—An acknowledgment of the service of notice to take a deposition duly made by the attorney for the party to whom the notice was directed is conclusive against a motion to suppress the deposition for want of service of such notice.
Cohen v. Reichman, 164, 167 (3).

DEPOSITS—

Application of, on debts due bank, see BANKS AND BANKING.

DIRECTING VERDICT—

See TRIAL 5.

DISCOVERY—

Rule to Answer Interrogatories.—Insufficiency of Time.—Relief.—Under §§405, 410 Burns 1908, §§396, 401 R. S. 1881, authority is expressly conferred on the courts to grant extensions of time in such matters as the discharge of a rule against a party to file answers to interrogatories. *Houser v. Laughlin*, 563, 574 (10).

DISCRETION OF COURT—

See JUDGMENT 3.

DISMISSAL—

See APPEAL 45, 49, 67-74.

DIVORCE—

1. *Alimony.—Review.*—The amount of alimony to be allowed is within the discretion of the trial court, which should be exercised with a view to the wealth of the parties and their sources of income, their ages, health, needs, innocence or culpability in the matter tried, and all other elements bearing upon the subject, and on appeal it will be presumed that such discretion has been properly exercised, so that in the absence of a showing to the contrary an allowance made by the trial court will not be interfered with. *Miller v. Miller*, 644, 658 (19).
2. *Complaint.—Allegations.*—The allegation in a complaint for divorce showing plaintiff's residence in Howard County, and in Center Township, is equivalent to an allegation that Center Township mentioned is in Howard County. *Miller v. Miller*, 644, 652 (8).
3. *Complaint.—Allegations.—Occupation.*—A general averment that plaintiff in a divorce action was a housekeeper, sufficiently complies with the statutory requirement as to statement of the applicant's occupation. *Miller v. Miller*, 644, 650 (5).
4. *Complaint.—Averments as to Domicile.*—A departure from the statutory language concerning domicile will not be fatal in a complaint for divorce, where the facts conferring jurisdiction can be gathered from the entire pleading. *Miller v. Miller*, 644, 650 (6).
5. *Complaint.—Residence.—Affidavit.*—Where a complaint for divorce is verified, and in addition to its own necessary jurisdictional averments contains the facts as to residence and occupation required by §1066 Burns 1908, §1031 R. S. 1881, to be shown by affidavit, a separate affidavit is not necessary. *Miller v. Miller*, 644, 649 (2).
6. *Complaint.—Residence.*—The allegation of a complaint for divorce, that "plaintiff is now, and has been for more than two years last past, a *bona fide* resident of Howard County in the State of Indiana," sufficiently showed the jurisdictional facts as to residence, as required by §1066 Burns 1908, §1031 R. S. 1881, where the action was brought in the county named. *Miller v. Miller*, 644, 649 (3).
7. *Complaint.—Residence.*—The facts embraced in the requirement of §1066 Burns 1908, §1031 R. S. 1881, that the applicant for a divorce shall have been a *bona fide* resident of the State for the last two years, and of the county for at least six months, immediately preceding the filing of the suit, are jurisdictional and their existence should be averred in the complaint or petition. *Miller v. Miller*, 644, 648 (1).
8. *Complaint.—Showing as to Residence and Occupation.*—A verified complaint for divorce, containing general averments as to residence and occupation of plaintiff, and stating facts from which it appeared that plaintiff was a *bona fide* resident of a specified township in the county for the required time, sufficiently complied with §1066 Burns 1908, §1031 R. S. 1881, requiring an affidavit accompanying a complaint for divorce showing certain facts as to residence and occupation. *Miller v. Miller*, 644, 651 (7), 652 (7).
9. *Complaint.—Verification.—"Subscribe."*—The word "subscribe" when applied to the act of signing one's name to an instrument in writing, means the signing of such name beneath or

DIVORCE—Continued.

at the end of such instrument, hence it sufficiently appears that a complaint for divorce was subscribed and sworn to by plaintiff, where her name is signed at the conclusion of the pleading and followed by the officer's jurat merely stating that the instrument was subscribed and sworn to, but not stating by whom, and this notwithstanding the names of the attorneys also appear at the close of such pleading. *Miller v. Miller*, 644, 653 (10).

10. *Evidence.—Sufficiency.*—A judgment for plaintiff, in a divorce action, having evidence to support it, will not be reversed on the evidence, although such evidence was conflicting and showed that at times plaintiff participated in physical encounters with defendant. *Miller v. Miller*, 644, 658 (18).

11. *Evidence.—Residence.*—The fact of plaintiff's residence for the time required by the divorce act (§1066 Burns 1908, §1031 R. S. 1881) need not be established by formal and express proof, but it is sufficient if, as a whole, the testimony of at least two qualified witnesses establishes the fact of residence for the required time to the satisfaction of the court.

Miller v. Miller, 644, 656 (15), 657 (15).

12. *Evidence.—Sufficiency.—Residence.*—Where the testimony of plaintiff in a divorce suit showed that at the time of filing the complaint she was, and for more than two years immediately prior thereto had been a *bona fide* resident of the county and State, it together with the testimony of another qualified witness to the same effect, was sufficient to show residence within the requirements of §1066 Burns 1908, §1031 R. S. 1881.

Miller v. Miller, 644, 658 (17).

13. *Showing as to Residence and Occupation.—Statutes.*—The requirement of §1066 Burns 1908, §1031 R. S. 1881, as to a showing of residence and occupation by affidavit accompanying a complaint for divorce, is mandatory in that there must be a substantial compliance as to each fact required to be presented by such affidavit, and since the manifest intent of the statute is to prevent the procurement of divorces by nonresidents through fraud or imposition on the courts, such intent must be considered in determining the sufficiency of the showing contained in such an affidavit; and where, in lieu of a separate affidavit, the facts literally required to be shown thereby are attempted to be set out in a verified complaint, all the facts pleaded bearing on the sufficiency of the showing will be considered, and if a case apparently free from suspicion is presented a relatively wider departure from strict compliance will be construed as a substantial compliance.

Miller v. Miller, 644, 649 (4).

14. *Witnesses.—Competency.—Residence.*—A witness who testified that he was a freeholder and householder, but did not testify as to his residence or domicile, was not qualified under §1066 Burns 1908, §1031 R. S. 1881, to testify as to the residence of plaintiff in a divorce action.

Miller v. Miller, 644, 654 (12).

15. *Witnesses.—Competency.—Residence.*—The qualification of a witness to prove residence of plaintiff in a divorce suit need not be established by formal and express proof, and it is sufficient if the evidence as a whole clearly establishes that such witnesses are resident freeholders and householders of the State.

Miller v. Miller, 644, 656 (14).

16. *Witnesses.—Competency.—Residence.*—Since an action for divorce is impliedly classed as a civil action, and the civil code

DIVORCE—Continued.

(§519 Burns 1908, §496 R. S. 1881) provides that parties to a suit are competent witnesses except in certain cases, and in view of the fact that the divorce act does not disqualify a witness on account of interest, plaintiff in a divorce suit, who qualified as any other witness for that purpose, was competent to testify in her own behalf on the subject of her residence.

Miller v. Miller, 644, 655 (13).

17. *Witnesses.—Qualifications.—Evidence.*—Evidence showing that plaintiff in a divorce suit was compelled to leave the common home of herself and husband, that she left with no intention of returning and rented a house at the county seat, where she and a minor daughter were living at the time of the trial, together with evidence showing that she owned real estate in the county, sufficiently showed her qualification as a witness in her own behalf on the question of her residence.

Miller v. Miller, 644, 656 (16).

DOMICILE—

Averments as to, see **DIVORCE** 4.

DRAINS—

1. *Proceedings to Establish.—Notice.—Service.*—Under §6142 Burns 1908, Acts 1907 p. 508, relating to notice in drainage proceedings, proper service of notice may be had by leaving a copy with the occupant of the lands affected, or by leaving a copy at the last and usual place of residence of the person to be served, or of the occupant of his lands, so that the testimony of a landowner that he had not "received" notice of a drainage proceeding was insufficient to show that such notice had not been served.

Baker v. Osborne, 518, 522 (4).

2. *Establishment.—Negligence of Commissioners.—Actions.*—Under the drainage act of 1905, Acts 1905 p. 456, providing that after certain preliminary steps the court shall refer the proceeding back to the drainage commissioners to proceed with the work and make final report, and that they shall determine definitely the best and cheapest method of drainage, the route, location and character of the proposed work, and fix the same by metes and bounds, etc., and requiring them to assess the benefits and damages, the drainage commissioners, in determining such matters, are required to exercise discretion and judgment, and, even though not strictly judges, are within the provisions of the law exempting one from liability for misconduct or delinquency in the discharge of a judicial duty, and hence the commissioners in charge of a drainage construction were not liable for their alleged failure to exercise proper care and skill in planning the drain which, because of its grade, was worthless to plaintiff whose lands had been assessed therefor.

State, ex rel. v. Gough, 118, 121 (1).

DUTIES—

Of master, see **MASTER AND SERVANT** 26-32.

EJECTMENT—

See **CANCELLATION OF INSTRUMENTS**.

EMPLOYES—

Injuries to, see **MASTER AND SERVANT** 36.

EQUITY—

"Laches."—Laches is defined to be "such neglect or omission to do what one should do as warrants the presumption that he has abandoned his claim and declined to assert his right", and the question of what amounts to laches in a given case is for the sound discretion of the court, dependent upon the particular facts and circumstances. *Patterson v. State Bank, etc.*, 331, 339 (11).

ESTATES—

See WILLS 3.

Created, see HUSBAND AND WIFE 2.

ESTOPPEL—

See HUSBAND AND WIFE 11; MORTGAGES 6.

Of wife to assert suretyship, see HUSBAND AND WIFE 3.

To deny liability, see HUSBAND AND WIFE 6.

1. *Elements.*—One relying upon the act or declaration of another as an estoppel must show that he acted upon the same and was influenced thereby in a way that would result in injury if the other person is permitted to gainsay or deny the truth of what he did, and it is essential to estoppel that the person relying thereon must have been misled or deceived by such act or declaration. *Pabst Brewing Co. v. Schuster*, 375, 381 (4).
2. *Equitable Estoppel.—Elements.*—The elements of an equitable estoppel are, misrepresentation of a material fact by the party sought to be estopped, made with knowledge of the facts with the intention that another, who was ignorant of the facts, should act thereon, and a reliance upon such representation by such other in the doing of some act to his injury, which he was thereby induced to do and which he would not have done except for such representation. *Taylor v. Griner*, 617, 622 (5).
3. *Estoppel by Conduct.*—Where a party sought to be estopped was careless in making statements about which he ought to have known the truth, he may in some cases be held to constructive knowledge of the facts, and if the other party was negligent or corrupt in not seeking the truth, he will be charged with knowledge thereof. *Taylor v. Griner*, 617, 622 (6).

EVICTIION—

See COVENANTS 2.

EVIDENCE—

See APPEAL 9, 65, 105, 107; BILLS AND NOTES 10, 12, 13; CARRIERS 1; CHATTEL MORTGAGES 1, 2, 5; CONVERSION 1, 6, 7; DIVORCE 10-12; GIFTS 4; GUARDIAN AND WARD 14; HUSBAND AND WIFE 1, 11; INTOXICATING LIQUORS; MASTER AND SERVANT 34; PAYMENT 1, 2; PRINCIPAL AND AGENT 1; STREET RAILROADS 4; TRADE-MARKS AND TRADE-NAMES 16; TRESPASS 7; TRUSTS 8; VENDOR AND PURCHASER 2, 5.

Admission of, see APPEAL 6, 7, 87, 123-125; GUARDIAN AND WARD 3; HUSBAND AND WIFE 5.

Exclusion of, see APPEAL 85, 86; GUARDIAN AND WARD 5.

Objections to, see APPEAL 8, 81, 83.

Reception of, see TRIAL 3, 4.

EVIDENCE—Continued.

Statement of, see **APPEAL 64.**

Sufficiency of, see **APPEAL 13.**

Weight of, see **APPEAL 84.**

It is the province of the court on appeal to declare what force and effect shall be given to, consisting entirely of records, see **APPEAL 76.**

1. **Admissibility.—Value of Property.**—In an action for damages for the conversion of a piano which defendant had taken in trade for a more valuable instrument, the amount allowed for the piano in suit as credit on the new instrument was admissible in evidence on the question of value, though the fact that such credit was allowed on the purchase price of a more valuable instrument could properly be considered as bearing on the weight of such evidence. *Wulschner-Stewart Music Co. v. Faulkner*, 208, 211 (3).
2. **Admissibility.—Matter Explanatory of Facts in Evidence.**—In an action for injuries sustained by being struck by an electric car, where defendant's attorneys at the trial put in evidence the fact that, though plaintiff claimed that riding on cars caused him great pain, he made a trip on defendant's road about a month after the accident, it was proper to admit the testimony of plaintiff that he made the trip, while suffering much pain, in compliance with the request of defendant's claim agent who told him that defendant might settle, where the court stated that the evidence was not admitted for the purpose of binding defendant in any way, but merely to show why and under what circumstances plaintiff made the trip.
Indiana Union Traction Co. v. Kraemer, 190, 195 (6).
3. **Admissions.—Pleadings.—Claims.**—A claim filed against an estate, and withdrawn, was admissible as an implied admission against the plaintiff in a subsequent action against the widow of decedent to recover for the same services.
Templer v. Lee, 433, 435 (1).
4. **Admissions.—Pleadings.—Conclusiveness.**—Under some circumstances admissions contained in pleadings are conclusive for the purpose of the trial, as where they contain no conflicting statements respecting the subject-matter of the admission; but a withdrawn and abandoned paper in another cause, though admissible in evidence, is merely evidence of an admission and not conclusive, and may be rebutted and all the circumstances of its making explained; hence in an action against the widow of a decedent to recover for services rendered, where a claim filed by plaintiff against the estate was introduced on the theory of an admission against plaintiff, it was not error to permit plaintiff to show that the claim was filed against the estate on advice of an attorney and that on discovering her error she withdrew it and instituted the action against defendant by whom she was employed.
Templer v. Lee, 433, 437 (2).
5. **Consideration by Jury.**—It is the exclusive province of jurors to decide what weight and probative force they will give to each item of evidence, and while a jury is not bound to give controlling effect to any particular evidence, it may do so, if it believes it should have such effect.
Indianapolis Traction, etc., Co. v. Taylor, 309, 315 (6).
6. **Intent.—Presumptions.**—A man is presumed to intend the consequences of his own acts.
Hartzler v. Goshen, etc., Ladder Co., 455, 469 (16).

EVIDENCE—Continued.

7. *Judicial Notice.*—The court on appeal cannot judicially know that a witness who testified in the case, and whose name is the same as one of the attorneys, is the same man as the attorney.
Miller v. Miller, 644, 654 (11).
8. *Judicial Notice.—Presumptions.*—The court takes judicial notice that the city of Kokomo is in Center Township, Howard County, Indiana, that there is no other city of Kokomo in the State, and that there is a Clay Township in said county; and where a complaint for divorce filed in the circuit court of that county contained allegations respecting Clay Township and the city of Kokomo, it will be presumed that the Clay Township mentioned is Clay Township in said county.
Miller v. Miller, 644, 652 (9).
9. *Opinion of Nonexpert.—Value.—Competency.*—In an action for damages for the conversion of a piano, plaintiff, who had previously testified as to his familiarity with the piano in question and that he knew what pianos of the same kind and condition would sell for, was sufficiently qualified to testify to the value of the piano at the time of the conversion, and the fact that he was not acquainted specially with pianos was a circumstance going only to the weight of his testimony.
Wulschner-Stewart Music Co. v. Faulkner, 208, 211 (2).
10. *Parol Evidence.—Identity of Mortgaged Chattels.*—In replevin to recover mortgaged chattels, the description in the mortgage or writ is not the only means of identifying the property, but parol evidence may be employed to aid in its identity.
Hallagan v. Johnston, 509, 514 (4).
11. *Weight of Evidence.—Rejection.*—A jury has no right to arbitrarily reject or refuse to consider the testimony of any witness; but if there is anything in the character, appearance or conduct of the witness, or in his testimony when considered in the light of other testimony, and the circumstances of the case, that would make his testimony seem unworthy of belief, or if he has been successfully impeached or contradicted, the jury may reject it to the extent that they regard it as false.
Indianapolis Traction, etc., Co. v. Taylor, 309, 314 (4).

EXAMINATION—

Voir dire, of jurors, see MASTER AND SERVANT 33.

EXCEPTIONS—

See TRIAL 30.

To conclusions of Law, see APPEAL 114-116.

EXCEPTIONS, BILL OF—

Time of Presentation.—Extensions.—Statutes.—In order to secure an extension of the time for preparing and presenting a bill of exceptions, a proper application and showing therefor under oath must be made before the expiration of the time first allowed, as provided in §661 Burns 1908, Acts 1905 p. 45, and an affidavit filed after the expiration of the time first given, explaining the cause of delay, is insufficient; hence where the certificate to a bill of exceptions discloses that the bill was presented on the day before the time limit expired, that it was then incomplete, and that it was thereafter presented to the court with additions and accompanied by an affidavit explaining the cause of delay, the evidence therein contained was not properly in the record.

City of Huntington v. Kaufman, 341, 345 (4).

EXCESSIVE DAMAGES—

See DEATH 3; TRESPASS 1.

EXCESSIVE LEVY—

See TAXATION 1.

EXECUTION—

See CHATTEL MORTGAGES 2; REPLEVIN 3.

EXECUTORS AND ADMINISTRATORS—

1. *Actions.—Complaint.—Demurrer.*—A demurrer for want of facts addressed to the complaint of an administrator raises the question of whether it states a cause of action in his favor in the capacity in which he sues. *Euler v. Euler*, 547, 555 (4).
2. *Claims.—Contracts of Suretyship.—Statutes.*—The wisdom of the provisions of §2831 Burns 1908, §2313 R. S. 1881, providing that before an estate of a decedent may be resorted to to coerce the payment of a note upon which he is surety, it must be shown that the principal is insolvent, or is a nonresident of the State, is purely a legislative question, and the courts cannot disregard its plain provisions, even where the note sought to be enforced was executed in another state by nonresidents of this State and payable to a nonresident who seeks its enforcement. *Patterson v. State Bank, etc.*, 331, 338 (8).
3. *Inventory.—Operation and Effect.*—The fact that an administratrix did not include a certain claim in her inventory of the estate, could not conclude her from recovering thereon and at most could only affect the weight of her evidence in support of the claim. *Todd v. Guffin*, 605, 610 (4).

EXEMPLARY DAMAGES—

See DAMAGES 2.

EXPERTS—

Credibility of, see WITNESSES 1.

Instruction concerning testimony of, see TRIAL 11, 13.

FENCES—

Partition Fence.—Foreclosure of Lien.—Complaint.—Burden of Proof.—A complaint for the foreclosure of a lien for the cost of constructing a partition fence in pursuance to the provisions of §7377 *et seq.* Burns 1908, Acts 1897 p. 184, need not aver that at the time the proceedings were begun, the lands of the defendant were enclosed by a fence to retain stock, but the defendant has the burden of alleging and proving that his lands are within the exception of the statute. *Deemer v. Knight*, 397 (1).

FINDINGS—

See TRIAL 28-36.

FORECLOSURE—

See MORTGAGES 3, 4.

Of lien, see FENCES.

Of mortgage, see SUBROGATION.

FORFEITURES—

See MINES AND MINERALS 1.

FORMER ADJUDICATION—

See JUDGMENT 8; PLEADING 17.

FRAUD—

See CONTRACTS 8, 9; HUSBAND AND WIFE 4; TRADE-MARKS AND TRADE-NAMES 16.

FREIGHT—

Conversion of, see CARRIERS 1, 2.

GIFTS—

See BILLS AND NOTES 1.

Causa mortis, see HUSBAND AND WIFE 8.

1. *Inter Vivos.—Burden of Proof.*—One taking under a voluntary settlement or gift, containing no power of revocation, has the burden of proving that there was a distinct intention on the part of the donor to make the gift irrevocable.
Crawfordsville Trust Co. v. Ramsey, 40, 69 (11).
2. *Inter Vivos.—Conditions.*—It is not necessary that the condition that the property shall not pass until the death of the donor be expressly stated in order to invalidate the gift as one *inter vivos*, but it is sufficient if the condition is implied.
Crawfordsville Trust Co. v. Ramsey, 40, 68 (9).
3. *Inter Vivos.—Special Findings.*—Special findings that a donor at the time of making an alleged gift was suffering from an incurable disease and knew that death was near, that the gift was made in expectation of death from such disease, and that it was conditioned on that event, are inconsistent with a gift *inter vivos*.
Crawfordsville Trust Co. v. Ramsey, 40, 68 (8).
4. *Inter Vivos.—Evidence.—Sufficiency.*—On the question of the validity of a gift *inter vivos*, a showing that the subject of the gift was assigned in blank with a reference to donor's will as furnishing the purpose and terms of the gift, and was delivered to the secretary of a trust company with instructions to care for same, that such secretary understood that the donor had retained the income from such gift, that he failed to say anything about the transaction to the trust company or the board of county commissioners, who were designated in the will as trustees to receive the property given, and that shortly before donor's death such secretary procured from him a second assignment, etc., is insufficient to show an intention to make an irrevocable gift.
Crawfordsville Trust Co. v. Ramsey, 40, 69 (10), 70 (10).
5. *Causa Mortis.—Inter Vivos.*—In the case of a gift *causa mortis* the title does not pass immediately, but the gift is conditional in that it can take effect only on the death of the donor, who in the meantime can revoke it, but to constitute a valid gift *inter vivos*, it is essential that the article given should be delivered absolutely and unconditionally, so as to take effect at once and completely, and where one intends a gift *inter vivos* through the instrumentality of an agent, the agent must have performed what was incumbent upon him to make the transfer complete during the donor's lifetime, or the gift fails; hence an assignment of stocks and bonds and the delivery of same to the secretary of a trust

GIFTS—Continued.

company to be cared for until the donor's death, when they were to be delivered to certain trustees, of whom the trust company was one, and made without knowledge or acceptance by either of the trustees during the donor's lifetime, did not constitute a gift *inter vivos*. *Crawfordsville Trust Co. v. Ramsey*, 40, 66 (7).

GOODS—

Failure to deliver, see **SALES** 1.

GUARDIAN AND WARD—

1. *Accounting and Settlement.—Opening and Vacating.—Limitation of Actions.*—While an ordinary action by the administrator of a deceased ward against the guardian for money had and received would be controlled by the six years' statute of limitations, an action under §2925 Burns 1908, §2403 R. S. 1881, to set aside the final settlement of such guardian, must be brought within three years from the date of the settlement sought to be set aside. *Euler v. Euler*, 547, 560 (14).
2. *Accounting and Settlement.—Opening and Vacating.—Statutes.*—By virtue of §3074 Burns 1908, §2527 R. S. 1881, providing that the bond given by any guardian may be put in suit by any person entitled to the estate, "and such suit shall be governed by the law regulating suits on the bonds of executors and administrators", an action to set aside a guardian's final settlement may be maintained under §2925 Burns 1908, §2403 R. S. 1881, providing for setting aside and vacating the final settlements of decedents' estates, although not expressly authorized by the latter section. *Euler v. Euler*, 547, 554 (3).
3. *Action to Open and Vacate Settlement.—Admission of Evidence.*—In an action to set aside the final settlement of a guardian, the admission of the testimony of the probate commissioner as to certain proceedings and statements made by the guardian when his reports were filed and acted upon, was proper. *Euler v. Euler*, 547, 561 (16).
4. *Action to Open and Vacate Settlement.—Complaint.—Sufficiency.*—A complaint by the administrator of the estate of a deceased ward against the guardian to set aside the latter's final settlement, alleging facts showing that none of the charges made by such guardian were legal or proper, and that his report showed an appropriation of all the funds and an indebtedness due him from his ward, was not open to the objection that it failed to show an injury to plaintiff from the mistake or fraud complained of. *Euler v. Euler*, 547, 558 (9).
5. *Action to Open and Vacate Settlement.—Exclusion of Evidence.*—A contract by those who expected to inherit the real estate of an insane ward, made with reference to such real estate, and under which the guardian was to care for said ward, while made for the ward's benefit, affected their interests alone in his real estate, so that, in an action after the ward's death by the administrator of his estate against the guardian to open and vacate the final settlement, evidence on behalf of the guardian showing a demand that the heirs comply with their agreement, and their refusal, was properly excluded. *Euler v. Euler*, 547, 562 (17).
6. *Action to Open and Vacate Settlement.—Complaint.—Harmless Error.*—Although a complaint, under §2925 Burns 1908, §2403 R. S. 1881, to set aside the final settlement of a guardian should aver

GUARDIAN AND WARD—Continued.

that plaintiff was neither personally present at the settlement, nor summoned to appear, the error in overruling the demurrer to the complaint in such an action brought by the administrator of a deceased ward, for failure to contain such averment, was harmless, where plaintiff was permitted to prove that he had not qualified at the time of the settlement and could not have been present as such administrator. *Euler v. Euler*, 547, 557 (7).

7. *Actions.—Trial.—Peremptory Instructions.*—In an action against plaintiff's former guardian to recover the amount due plaintiff on final settlement of the guardianship, the giving of a peremptory instruction to find for defendant cannot be sustained, where there was evidence tending to show that defendant at the time of making his report was chargeable with the sum claimed by plaintiff, that he was unable to and did not pay plaintiff and that he conveyed land to her as security for the amount, with the understanding that he would pay her in about five years on reconveyance of the land to him, nor can such instruction be justified on the theory that plaintiff's action was barred by the statute of limitations, in view of the fact that the action was on the contract and the statute had not run as against it, although an action based upon the default of the guardian at the time of making final report would have been barred.

Baker v. Bundy, 272, 279 (5), 281 (5).

8. *Actions.—Complaint.—Theory.*—A complaint against the former guardian of plaintiff, alleging that defendant, father of the plaintiff, had in his hands as her guardian a certain sum for which he was accountable, that when plaintiff became of legal age defendant represented to her that he had not the money with which to make final settlement and that if she would sign a receipt for the money so that he could make and file his report he would deed her certain land to secure the payment of the amount due her, which he agreed to pay with interest on a reconveyance to him, that she assented to such arrangement and signed the receipt, that defendant filed his final report and procured a discharge, but that he has not paid plaintiff, though plaintiff executed and tendered to him a deed of reconveyance and demanded payment, and alleging further that she brings such deed into court for defendant's use, and praying judgment for the sum named, although embracing facts consistent with the theory of a complaint to declare and enforce a trust, presents an action at law for the recovery of money, properly triable by jury.

Baker v. Bundy, 272, 276 (2), 277 (2).

9. *Majority of Ward.—Termination of Trust.—Relation.—Actions.—Statute of Limitations.*—On the arrival of a minor ward at the age of twenty-one years the relation of debtor and creditor arises as between himself and his guardian respecting any balance in the hands of the guardian unpaid and unaccounted for, giving the ward a right of action against the guardian personally without prior demand, and such an action is barred by the statute of limitations in six years after the ward becomes of age.

Baker v. Bundy, 272, 281 (7).

10. *Opening and Vacating Settlements.—Complaint.—Inferences from Facts Averred.*—A complaint to set aside a settlement made by a guardian, though merely mentioning the guardian's reports by way of reference, explanation or recital, is not insufficient as failing to allege that any current report or final settlement was

GUARDIAN AND WARD—Continued.

made, where the facts alleged justify the inference that such reports and final settlement were made and filed.

Euler v. Euler, 547, 559 (12).

11. *Opening and Vacating Settlements.—Concealment or Misrepresentation by Guardian.*—A guardian, being an officer of the court, is under obligation to make full and true disclosures in his reports of all matters materially affecting his trust of which he has knowledge, so that any misrepresentation or concealment, whereby an approval of a settlement giving him an unfair advantage is procured, will vitiate such settlement and remove the foundation upon which the approval and order of the court rests.

Euler v. Euler, 547, 558 (11).

12. *Opening and Vacating Settlements.—Statutory Provisions.*—Although §2925 Burns 1908, §2403 R. S. 1881, providing for opening and setting aside settlements of decedents' estates, and under which an action may be maintained to open and set aside the settlement of a guardian, expressly restricts the right of action to any person interested who was neither present at the final settlement nor personally summoned to attend the same, such restriction does not apply where the action is to set aside the settlement of a guardian, for the reason that no notice of final settlement of a guardianship is required except where made under §3070 Burns 1908, §2523 R. S. 1881, providing for settlement of estates of deceased wards in certain cases without administration.

Euler v. Euler, 547, 556 (6).

13. *Opening and Vacating Settlements.—Complaint.—Persons Entitled to Maintain Action.*—While the language of §2925 Burns 1908, §2403 R. S. 1881, under which an action to open and set aside the final settlement of a guardian may be maintained, discloses a legislative intent to limit its application to such persons only as are adversely affected by the mistake, fraud or other illegality which entered into the settlement, where the property sought to be recovered is personal property of a deceased ward, the action should be prosecuted by the administrator of his estate, since by operation of law such property goes to the administrator; hence the complaint in such an action by an administrator was not insufficient, although it disclosed an interest in the heirs of the deceased ward which seemingly brought them within the spirit of the statute as being the proper parties to maintain the action.

Euler v. Euler, 547, 555 (5).

14. *Payments by Guardian.—Evidence.—Appeal.*—In an action by a guardian to recover money erroneously paid to defendant as change on the latter's payment of a note due to plaintiff's ward, where it appears from the record on appeal that plaintiff testified that he was such guardian, and that defendant's counsel admitted that plaintiff had purchased the note from the original payee before maturity, the judgment for plaintiff cannot be reversed on the ground that the proof does not support the allegations of the complaint, since, though there was no other evidence on the subject, it cannot be said that the jury could not have properly inferred from the evidence given, and the conduct of the parties, that plaintiff purchased the note as guardian with the funds of his ward.

Morris v. Reyman, 112, 117 (4).

15. *Protection of Ward's Interest.*—The law jealously guards the interests of those whose estates are in the care and keeping of the courts.

Euler v. Euler, 547, 558 (10).

GUARDIAN AND WARD—Continued.

16. *Relation.—Expiration of Trust.*—The relation of guardian and ward is a continuing trust which expires by limitation of law when the ward arrives at the age of twenty-one years, except that under some circumstances it may be continued for purposes of settlement.
Baker v. Bundy, 272, 280 (6).

HARMLESS ERROR—

See APPEAL 122-151; GUARDIAN AND WARD 6; STREET RAILROADS 1.

HUSBAND AND WIFE—

Notes between, see BILLS AND NOTES 11.

1. *Assignment by Husband to Defeat Wife's Interest in Estate.—Evidence.—Admissibility.*—In a widow's action to set aside an assignment of stocks and bonds made by her husband for the purpose of defeating her rights as widow, the admission of evidence of plaintiff to the effect that she did not see the instrument, which was executed only two days before his death, was proper as bearing on the question of decedent's mental condition.
Crawfordsville Trust Co. v. Ramsey, 40, 74 (17).
2. *Conveyances.—Estates Created.*—A conveyance of land to a husband and wife creates a tenancy by entireties and the survivor takes the whole by his right of survivorship.
Tharp v. Updike, 452, 454 (1).
3. *Estoppel of Wife to Assert Suretyship.—Answer of Suretyship.—Reply.—Sufficiency.*—A married woman may be estopped from asserting suretyship in an action against her on a note, and where suretyship was pleaded, a paragraph of reply setting up all the elements of estoppel on the ground of misrepresentations by defendant in obtaining the money, except that there was no averment that the representations were made with knowledge of their falsity, was sufficient, where the allegations of the answer force the conclusion that such representations were false and made with knowledge of their falsity, and especially in view of the fact that the note sued on was signed by her alone, since in itself it constituted at least a *prima facie* representation that she signed as principal and that the debt was her debt.
Taylor v. Griner, 617, 622 (7).
4. *Gift by Husband to Defeat Wife's Interest in Estate.—Fraud.*—A finding of fraud as a fact was not essential to authorize a conclusion of law that a decedent's widow was entitled to her distributive share in property involved in a gift or assignment made by him with a view to defeating her rights as a widow.
Crawfordsville Trust Co. v. Ramsey, 40, 74 (15).
5. *Mortgages.—Suretyship of Wife.—Admission of Evidence.*—In an action on the note of a married woman and to foreclose a mortgage securing same, where a part of the proceeds of the note went to the payment of a prior mortgage, evidence was admissible to show that such prior mortgage was given to secure an advance of money to her husband to purchase goods, and that plaintiff knew that she never received any benefit therefrom.
Pabst Brewing Co. v. Schuster, 375, 383 (6).
6. *Mortgages.—Suretyship of Wife.—Estoppel to Deny Liability.*—While a married woman is subject to estoppel *in pais*, some element of fraud must enter into her conduct so that the estoppel shall be predicated upon tort, and not upon contract; hence where a married woman, on executing a note and mortgage, made

HUSBAND AND WIFE—Continued.

an affidavit disclosing that a part of the money obtained was to discharge a prior mortgage but not indicating whose debt the prior mortgage was given to secure, and the lender itself paid to the holder the amount due on such prior mortgage, there was, notwithstanding a further recital in the affidavit that the money was paid to her "by check and draft payable to her order", no fraud, misrepresentation or concealment affecting the lender's action so as to work an estoppel *in pais* preventing her from denying liability on the ground that she did not receive the money, but that it was applied to the discharge of her husband's debt.

Pabst Brewing Co. v. Schuster, 375, 381 (5), 383 (5).

7. *Mortgages.—Suretyship of Wife.—Estoppel to Deny Liability.—*

The fact that a married woman, on executing a note and mortgage for a loan, made an affidavit stating that "said loan and the proceeds thereof" were "paid to her by check and draft payable to her order", that part of the money was to be used to pay off a mortgage on her real estate and that the balance was for her own separate use in the betterment of her own property, did not estop her under the provisions of §7856 Burns 1908, Acts 1903 p. 394, relating to loans to married women, from proving that part of the money was not received by her, but was paid by the lender to the holder of a prior mortgage on the same property to secure a loan to her husband, and in view of uncontradicted evidence sustaining that proposition, she was entitled to the protection afforded by §7855 Burns 1908, §5119 R. S. 1881, declaring that contracts of suretyship by a married woman are void as to her. (*Ludlow v. Colt* [1908], 41 Ind. App. 138, distinguished.)

Pabst Brewing Co. v. Schuster, 375, 379 (1), 380 (1).

8. *Power of Husband to Defeat Wife's Interest in Estate.—Wills.*

—Gifts Causa Mortis.—Where testator, after executing his will containing a bequest of stocks and bonds to trustees for charitable purposes, on learning that his wife could defeat the trust by electing to take under the statute instead of under the will, and while afflicted with a fatal malady, executed an assignment of such stocks and bonds in blank, with a reference therein to his will for the terms and purposes of the assignment, and delivered the same to the secretary of a trust company which was designated in the will as one of the trustees, to be cared for by such secretary, but without any knowledge or acceptance by either of the trustees, and thereafter while *in extremis* executed a new assignment in which he retained the income of the stocks and bonds during life, the transaction was testamentary in character rather than of the nature of a gift *inter vivos*; but, regardless of its character, it was not binding on the widow, since, while a husband as a general rule may do as he pleases with his personal property, he cannot at the approach of death give it away for the purpose of defeating his wife's rights under the statute.

Crawfordsville Trust Co. v. Ramsey, 40, 70 (12), 77 (12).

9. *Suretyship of Wife.—Answer.—Proof.*—In an action against a

married woman on a note and to foreclose a mortgage securing same, the allegation in her answer of suretyship, "that the entire consideration was used by her husband," was mere surplusage which imposed no additional burden in proving her defense, since the defense is made on proof of the suretyship and that she received no part of the consideration for which the note and mortgage were executed.

Taylor v. Griner, 617, 620 (4).

10. *Suretyship of Wife.—Answer.—Sufficiency.*—In an action against a married woman on a note signed by her alone, and to

HUSBAND AND WIFE—Continued.

foreclose the mortgage securing same, an answer alleging that she executed the note and mortgage as surety for her husband and received no consideration therefor, and that she was at the time and still is a married woman, was sufficient, although it would have been better pleading to have alleged that she received no part of the consideration for the note and that it did not inure to her benefit or the benefit of her estate.

Taylor v. Griner, 617, 619 (1).

11. *Suretyship of Wife. — Estoppel. — Evidence.* — In an action against a married woman on a note and mortgage, evidence that defendant's husband solicited plaintiff to lend his wife the money to improve her farm, that after some delay and efforts to obtain money from plaintiff, the note signed by the wife alone, and a mortgage signed by both husband and wife, together with a paper signed by the wife, ordering the money to be paid to her husband for her benefit, were forwarded to plaintiff, that the plaintiff believed and relied on the statement that the money was to be paid to the husband for the sole use and benefit of the wife and would not have made the loan but for such statement, together with other evidence, and in the absence of evidence of any fact to put plaintiff on inquiry, was sufficient to warrant the finding that defendant was estopped from setting up the defense that she signed the note and mortgage as surety for her husband.

Taylor v. Griner, 617, 623 (8).

IDEM SONANS—

Names, see **APPEAL** 49.

INCUMBRANCES—

Warranties against, see **COVENANTS** 4, 5.

INJUNCTION—

See **TRADE-MARKS AND TRADE-NAMES** 13.

1. *Action on Bond.—Real Party in Interest.*—Plaintiff, who as county surveyor, had performed services in connection with a proceeding to clean a drainage ditch, and had been compelled to employ counsel to procure the dissolution of a restraining order granted on the application of the defendants in a suit by them to enjoin the cleaning of such ditch, was, in his individual capacity, a real party in interest and entitled to maintain his separate action on the injunction bond, although such bond ran jointly to him as surveyor and another as township trustee, and notwithstanding he had been made a party to the injunction suit in his official capacity. *Crawford v. Spindler*, 1, 7 (3), 10 (3).
2. *Bonds.—Action.*—Where an injunction bond was entitled in the name of the plaintiff against two defendants, the name of one of whom was followed by "trustee" and the other by "surveyor," and the obligation was to "pay to defendant therein any and all damages and costs which may occur to them or either of them," such surveyor, who as an individual procured a dissolution of the restraining order, could maintain an action on such bond in his individual capacity, since the words "trustee" and "surveyor" as therein used, so far as the bond discloses, are merely *descriptio personae* and are to be treated as surplusage. *Crawford v. Spindler*, 1, 9 (4).
3. *Bonds.—Construction.—Persons Protected.*—An injunction bond executed pursuant to §1210 Burns 1908, §1153 R. S. 1881, is not to

INJUNCTION—Continued.

be construed in accordance with the strict rules applicable to obligations governed by the common law, but the purpose of the statute must be read into the bond in the light of §1278 Burns 1908, §1221 R. S. 1881, providing for recovery on a defective bond as if it were perfect, so that an injunction bond will inure to the benefit of all defendants though by its terms made payable to one only. *Crawford v. Spindler*, 1, 7 (2).

4. *Bonds.—Construction.*—An injunction bond executed pursuant to §1210 Burns 1908, §1153 R. S. 1881, should be liberally construed to carry into effect the purpose of the statute, which is to require "payment of all damages and costs which may accrue by reason of the injunction or restraining order" to "the adverse party affected thereby." *Crawford v. Spindler*, 1, 6 (1).

"INNOCENT TRESPASSER"—

See WORDS AND PHRASES.

INSTRUCTIONS—

See TRIAL 6-19.

INSURANCE—

1. *Action on Policy.—Amendment of Complaint.—Estoppel.*—An amended complaint based on the same policy sued on in the original complaint, except that a reformation as to the date of the policy was sought, was not open to the objection that the original complaint based on the policy as written and dated constituted an acceptance thereof so as to prevent plaintiff from afterwards pleading ignorance of its terms. *United States, etc., Ins. Co. v. Emerick*, 591, 597 (3).
2. *Action on Policy.—Total and Permanent Disability.—Jury Question.—Conclusiveness of Verdict.*—In an action to recover on the total and permanent disability clause contained in a policy of insurance, the question of whether the disability of the plaintiff is total and permanent within the meaning of the policy is for the court or jury to determine from all the evidence in the cause, hence where there was sufficient evidence to warrant the conclusion that the proof of loss furnished by plaintiff was sufficient, the verdict for plaintiff is conclusive. *Indiana Life, etc., Co. v. Patterson*, 291, 297 (4).
3. *Action on Policy.—Complaint.—Sufficiency.—Reformation of Policy.*—A complaint on a policy of insurance alleging that defendant solicited the insured to take an accident policy in consideration of an assignment of his wages, which insurance should be effective from date of application, and that thereafter defendant mailed to him a policy containing all the terms agreed to, except that by the mutual mistake of defendant and insured the date of the policy was fixed as of a time nine days subsequent to the date of application, sufficiently showed that the action was upon the theory that the policy sued on was the contract agreed upon, except as to the matter of date, which by mutual mistake was not the date agreed upon. *United States, etc., Ins. Co. v. Emerick*, 591, 595 (2).
4. *Action on Policy.—Waiver of Conditions Precedent.—Complaint.—Harmless Error.*—Where the complaint on an insurance policy, to recover the benefits therein provided on account of permanent disability from injuries, charged a waiver of the sufficiency of the

INSURANCE—Continued.

proof of injury and disability, which was a condition precedent, without averring the facts constituting the waiver, the overruling of a demurrer thereto, if erroneous by reason of such defect, was harmless, where it appeared from the whole record that such was the only condition presented to the jury as having been waived, that proof was heard upon the question, and that the finding of the jury was against the claim of defendant that the condition had not been waived and that there had been no sufficient compliance therewith.

Indiana Life, etc., Co. v. Patterson, 291, 295 (2).

5. *Action on Policy.—Complaint.—Averments of Total and Permanent Disability.*—In an action on a policy of insurance to recover disability benefits under a provision therein, which has been judicially construed to mean that the insured is entitled to payment in case he becomes totally and permanently disabled from following any occupation or engaging in any business from which he may by reasonable efforts obtain a livelihood, a complaint charging that plaintiff's injury was total and permanent, that he was totally and permanently disabled from performing any and all kinds of manual labor or business upon which he depended for a livelihood, and that he was totally and permanently disabled from following his usual occupation and from performing any kind of manual labor whatever, sufficiently averred that the disability was total and permanent within the meaning of the policy.

Indiana Life, etc., Co. v. Patterson, 291, 296 (3).

6. *Contracts.—Construction.*—Provisions in an insurance policy designed for the sole benefit of the company, will be most strongly construed in favor of the insured.

Ohio Farmers Ins. Co. v. Glaze, 147, 153 (2).

7. *Fire Insurance.—Proof of Loss.—Sufficiency.*—Where insured in a fire policy covering a mercantile stock furnished all the proof of loss that he was able to furnish, because of the loss of the original bills rendered for the goods, and supplied such loss in accordance with the requirements of the company to the extent of his ability by procuring statements from numerous merchants from whom he made purchases and furnishing the company copies of the same, and furnishing an invoice of the goods, which the company's adjuster accepted without requiring it to be verified, there was a substantial compliance with the provision of the policy that the insured must furnish a verified statement showing the cash value of each item of property destroyed and the amount of loss thereon, and the company was liable, notwithstanding a waiver agreement made subsequent to the loss and stipulating that any action taken by the company in investigating the amount of the loss could not operate as a waiver of any of the conditions of the policy. *Ohio Farmers Ins. Co. v. Glaze*, 147, 152 (1), 154 (1).

8. *Mutual Benefit Insurance.—Forfeiture for Nonpayment of Assessments.*—Where the provisions of an assessment insurance association as disclosed by its articles of incorporation, by-laws and contract of insurance, as well as the provisions of a note required to be executed by the applicant for insurance, relating to what was designated as a "guarantee deposit", though containing language which alone might indicate that each assessment for mortuary purposes should be levied *pro rata* on the "guarantee deposit" of each member, when considered as a whole, and in view of the general plan of the association, showed that such

INSURANCE—Continued.

was not the purpose of such "guarantee deposit", but that it was designed to guarantee the member's payment of his assessments and as a protection to the beneficiaries of those who did not default in their assessments, a finding and judgment against plaintiff in an action on a certificate issued by such association was correct, where it appeared that the insured died before the maturity of his note given on account of the "guarantee deposit" and without having paid the assessments levied against him, and plaintiff's right to recover was based on the contention that forfeiture was prevented by virtue of the provisions relating to such "guarantee deposit".

Stubbs v. Bankers Life Assn., 579, 585 (1).

9. *Stipulation as to Proof of Loss.—Waiver.*—An insurance company will be deemed to have waived the proof of loss required by the policy, where its agent, duly authorized to act with reference to the subject, accepts proofs different from those required by the policy, notwithstanding the policy prohibits any agent from waiving any of its conditions.

Ohio Farmers Ins. Co. v. Glaze, 147, 153 (4).

10. *Waiver of Conditions of Contract.—Authority of Agent.*—A stipulation in a fire policy that no agent has power to waive any condition unless by written endorsement thereon, refers only to conditions essential to the obligatory and binding effect of the contract between the parties in the first instance, and to its continuing force and obligation until loss occurs, and does not refer to stipulations as to the manner of making proof of loss, which an agent may waive without indorsement.

Ohio Farmers Ins. Co. v. Glaze, 147, 153 (3).

INTENT—

See EVIDENCE 6; TRADE-MARKS AND TRADE-NAMES 6.

INTEREST—

See BILLS AND NOTES 14.

INTER VIVOS—

See GIFTS 1-5.

INTERROGATORIES—

Failure to answer, see JUDGMENT 6.

Courts have authority to grant extensions of time to discharge a rule to file answers to, see DISCOVERY.

INTOXICATING LIQUORS—

Unlawful Sales.—Action for Damages.—Evidence.—Sufficiency.—In an action on a retail liquor dealer's bond for damages caused by the unlawful sale of intoxicating liquor, evidence showing that a license was duly issued to defendant in 1908 for the place where the alleged sale was made, that defendant's brother had acted as manager of the saloon for defendant from June, 1908, to some time in 1909 subsequent to the alleged sale, together with the testimony of the bartender that he was employed by defendant and that defendant's brother managed the saloon for defendant, was sufficient to warrant the jury in finding that the saloon was run under the license issued to defendant and was being operated by his agents at the time of the alleged sale.

Illinois Surety Co. v. State, ex rel., 31, 36 (7).

INVENTORY—

See EXECUTORS AND ADMINISTRATORS 3.

JUDGMENT—

See REPLEVIN 2, 3.

Final, see APPEAL 21.

Motion to modify, see APPEAL 5.

Presumptions to support, see APPEAL 103.

1. *Conclusiveness.—Parties.—Purchase of Property.*—While a judgment duly rendered is conclusive upon all the parties to the suit and their privies, one, who was not a party to a pending suit for the replevin of mortgaged chattels, and who purchased a horse of the defendant mortgagor at public auction, was not bound by the judgment subsequently rendered so as to preclude him from showing that the horse he purchased was not the one described in the mortgage. *Hallagan v. Johnston*, 509, 513 (2).
2. *Default.—Pending Motion for Change of Venue.*—Where judgment was taken against defendant by default pending a ruling on his motion for a change of venue from the county, a ruling on such motion is unnecessary. *Houser v. Laughlin*, 563, 571 (5).
3. *Default.—Motion to Set Aside.—Discretion of Court.*—Trial courts have discretionary power in passing on motions to set aside defaults and judgments, and their rulings on such motions will not be disturbed on appeal unless the record discloses an abuse of such discretion. *Kruse v. State, ex rel.*, 203, 208 (3).
4. *Default.—Vacating.*—Not only do the courts possess power, independent of statute, to exercise a very large discretion in vacating judgments entered by default, but discretion is vested in them to grant such relief by virtue of §405 Burns 1908, §396 R. S. 1881, providing that the court may relieve any party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect. *Houser v. Laughlin*, 563, 573 (8).
5. *Default.—Setting Aside.*—Where a cause, though not at issue, was set for trial on a definite date by agreement of the parties duly entered of record, the defendants by failing to appear in court at the time named were subject to default, and where it appeared that after defendants were defaulted the court treated the complaint as denied, heard the evidence, made a finding and rendered judgment accordingly, defendants were not entitled to have the judgment set aside on the ground that they had not been ruled to answer, and that a party is not entitled to default his adversary and take judgment against him for want of a pleading without first taking a rule against him requiring such pleading. *Kruse v. State, ex rel.*, 203, 206 (1).
6. *Default.—Grounds.—Failure to Answer Interrogatories.*—Under §410 Burns 1908, §401 R. S. 1881, providing for judgment by default against a party failing to plead or make up issues within the time prescribed; §365 Burns 1908, §359 R. S. 1881, providing that interrogatories must be answered within the time limited; and §409 Burns 1908, §400 R. S. 1881, providing that the court "shall compel the parties to file their respective pleadings and answers to interrogatories at such time as the court shall deem just, in no case allowing unreasonable delay", where a party fails to discharge a rule to file answers to interrogatories, the court may strike out his pleadings and enter judgment against him as by default. *Houser v. Laughlin*, 563, 573 (7).

JUDGMENT—Continued.

7. *Default.—Vacating.*—To entitle a party to relief under §405 Burns 1908, §396 R. S. 1881, from a judgment taken by default, he must show that he exercised reasonable diligence to prevent the entering of the judgment; so that where it appears that defendant was ruled to file answers to interrogatories and a default was taken on his failure to do so, a showing in an application for relief, that the failure to comply with the rule was due to alleged insufficiency of the time given, while appropriate as cause for an extension of the time, was insufficient to entitle him to the relief sought, in the absence of facts showing either mistake, inadvertence, surprise, or excusable neglect, within the meaning of the statute. *Houser v. Laughlin*, 563, 574 (9), 575 (9).
8. *Former Adjudication.—Burden of Proof.*—Defendant, who tenders the issue of former adjudication, has the burden of proof thereon. *Guyer v. Union Trust Co.*, 472, 487 (7).
9. *Modification.*—A motion to modify a judgment will not lie, where the effect of the modification would be to completely change an adverse judgment to one favorable to the party asking such modification. *Heaton v. Grant Lodge, etc.*, 100, 103 (2).

JUDICIAL NOTICE—

See EVIDENCE 7, 8.

JURISDICTION—

See APPEAL 1, 2; COURTS; TRUSTS 4.

The assignment of errors constitutes the complaint on appeal and, can only be acquired over the parties whose full names appear, see APPEAL 38.

JURY—

Consideration by, see EVIDENCE 5.

1. *Right of Trial by Jury.—Equitable Issues.*—When any essential part of a cause is exclusively of equitable cognizance, the right of trial by jury does not obtain, even though certain elements of an action at law may be incidentally involved. *McKinley v. Britton*, 21, 28 (9).
2. *Right of Trial by Jury.—Equitable Issues.*—In a suit to set aside a deed on the ground of fraud, a motion to submit the trial of the issues to a jury was properly overruled, since the action was in equity and the remedy sought is enforceable only by invoking the equitable powers of the court. *McKinley v. Britton*, 21, 28 (8).
3. *Waiver of Right to Jury Trial.—Appeal.—Record.—Presumptions.*—Where a cause tried by the court involved issues triable by jury, and on appeal the court is unable to determine from the record whether there had been a waiver of the right of trial by jury, it will be presumed that the trial court discharged its duty and that the submission of the cause to the court for trial without the intervention of a jury was rightly done. *Smith v. Collins*, 695, 696 (1), 697 (1).

KNOWLEDGE—

Of danger, see MASTER AND SERVANT 5, 37, 38.

Of defects, see MASTER AND SERVANT 7.

"LACHES"—

See WORDS AND PHRASES; APPEAL 47; PRINCIPAL AND SURETY.

LANDLORD AND TENANT—

1. *Construction of Lease.—Former Appeal.*—Even though the court on a subsequent appeal of the same case believed that the construction placed upon a lease by the court on the former appeal was incorrect, such former decision would control.

Harmon v. Pohle, 439, 442 (4).

2. *Leases.—Nature of Contract.—Personal Property.*—A lease for a term of years is an encumbrance against the possession of real estate, rather than against the title thereto, and is construed as personal property and not real estate.

Heaton v. Grant Lodge, etc., 100, 108 (5).

3. *Leases.—What Constitutes.*—A contract between the owner of a lot and a fraternal order that the former would construct a one-story building on his lot so that the latter could erect a second story to cover it and a similar building to be erected on an adjoining lot, and that in consideration for the erection of the second story the owner of such lot leased and rented the second story to such order for a period of ninety-nine years, gave to the latter no title or interest in the real estate, but was merely a lease for a term of years.

Heaton v. Grant Lodge, etc., 100, 109 (7).

LAST CLEAR CHANCE—

See STREET RAILROADS 1, 2, 5.

LAW OF THE CASE—

See APPEAL 154, 155.

LEASES—

See CONTRACTS 6; LANDLORD AND TENANT 2, 3; MORTGAGES 5.

Oil and gas, see MINES AND MINERALS 1-3.

LIMITATION—

Conditional, see DEEDS 2, 3.

LIMITATION OF ACTIONS—

See GUARDIAN AND WARD 1.

1. *Commencement of Action.—Amendment.—New Cause of Action.*—In an action on an accident policy, where an amended complaint was filed, based on the policy sued on in the original complaint, except that a reformation as to date of the policy was sought, the filing of such amended complaint was not the institution of a new cause of action, and not open to the objection that it was filed after the limitation provided in the policy had expired.

United States, etc., Ins. Co. v. Emerick, 591, 597 (4).

2. *Pleading.—Demurrer.*—The statute of limitations is an affirmative defense and cannot be raised by demurrer unless the pleading affirmatively shows on its face that sufficient time has elapsed to operate as a bar and that the case is not within any exception preventing the running of the statute.

Drebing v. Zahrt, 492, 497 (6).

LOOK AND LISTEN—

See RAILROADS 5, 6.

MACHINERY—

Safety of, see RAILROADS 14.

MASTER AND SERVANT—

1. *Injuries to Servant.—Assumption of Risk.*—While a servant assumes all the risks ordinarily incident to his employment, where his master temporarily requires of him services involving different duties and hazards not within the scope of his employment, the servant assumes only those risks which he may ascertain by the exercise of ordinary care for his own safety, and the master's failure to instruct and warn the servant renders him liable for injury resulting from such failure, where the servant is free from contributory negligence.

National Fire, etc., Co. v. Smith, 124, 137 (4).

2. *Injuries to Servant.—Assumption of Risk.*—Plaintiff, who was injured by being thrown from the beam of a plow on which he was riding while plowing a sheet, must be deemed to have assumed the risk, in the absence of allegations showing that he was unfamiliar with the plow and the uses to which it was put, since a man of common understanding must have known that if the point of the plow came in contact with any hard substance it would jump and be likely to throw a man riding on the beam so as to injure him. *Jourdan v. Town of Lagrange*, 502, 507 (5).

3. *Injuries to Servant.—Assumption of Risk.*—An employe assumes the risks ordinarily incident to his employment and is presumed to have knowledge of the defects and dangers that are open and obvious, or which may be known to him by the exercise of ordinary care.

Sullivan v. Indianapolis, etc., Traction Co., 407, 414 (5).

4. *Injuries to Servant.—Railroad Construction.—Assumption of Risk.*—A motorman operating a car drawing a plow on an uncompleted track on which no passenger or freight trains had been run was engaged in construction work and assumed the risk incident to such employment.

Egan v. Louisville, etc., Traction Co., 423, 427 (6).

5. *Injuries to Servant.—Knowledge of Danger.—Assumption of Risk.*—A servant, merely knowing that there is some danger without appreciating it, does not thereby assume the risk within the meaning of the rule that debars recovery, nor does knowledge of danger necessarily show negligence on his part.

National Fire, etc., Co. v. Smith, 124, 138 (6).

6. *Injuries to Servant.—Assumption of Risk.*—A ladder is a simple implement requiring only average intelligence to comprehend the dangers of its use, so that where an employe, who was injured by the breaking of a ladder, knew that such ladder was worn and old, he was chargeable with knowledge that it might break under his weight in using it, and assumed the risk thereof, even though the master was negligent in permitting him to use it.

Beard v. Goulding, 398, 405 (5).

7. *Injuries to Servant.—Knowledge of Defects.—Assumption of Risk.*—An adult servant of ordinary intelligence is presumed to have been capable of ascertaining every fact which could have been apprehended by the senses of a person having the same opportunities in relation to the dangerous conditions which caused the injury, and will be held to have assumed the risk, even though such danger was created by his master's negligence.

Beard v. Goulding, 398, 404 (4).

8. *Injuries to Servant.—Trial.—Instructions.—Assumption of Risk.*—In a servant's action against his master for damages on account of personal injuries, an instruction that the plaintiff must establish by a fair preponderance of the evidence that the de-

MASTER AND SERVANT—Continued.

fendant committed the acts of negligence charged, or some of them, which approximately caused the injuries complained of, or some of them, and if plaintiff established those things he could recover unless it was also shown that he was guilty of contributory negligence, did not attempt to state all the facts entitling plaintiff to recover, and was therefore not erroneous in omitting the theory of assumption of risk, where that element was fully covered in another instruction. *Burford v. Dautrich*, 384, 388 (5).

9. *Injuries to Servant.—Choice of Ways.—Assumed Risk.—Contributory Negligence.*—The rule that where two ways of performing a work are open to a servant, one of which is dangerous and the other safe, or one of which is attended with greater danger than the other, a servant, who, knowing the facts and realizing the danger voluntarily chooses the more dangerous course, will be denied a recovery for any resulting injury, is applicable in all its strictness, in cases in which the doctrine of assumed risk is recognized; but can be sustained only upon the theory of contributory negligence, in cases where the doctrine of assumed risk does not obtain. *Kingan & Co. v. Gleason*, 684, 689 (4).

10. *Injuries to Servant.—Complaint.—Contributory Negligence.—Assumption of Risk.*—The complaint in an action for the death of a servant, showing the peculiar and hidden dangers incident to the work that decedent was performing, his ignorance of such dangers and his want of skill and experience in relation thereto, defendant's knowledge thereof, and its failure to warn decedent on transferring him to such work which involved dangers not incident to his employment, is not insufficient on the ground that such averments are nullified by other allegations tending to show decedent's opportunity for knowing and appreciating the danger, since such allegations do not amount to an affirmative showing that he assumed the risk or that his negligence contributed to the injury. *National Fire, etc., Co. v. Smith*, 124, 139 (7).

11. *Injuries to Servant.—Contributory Negligence.—Violation of Rules.*—It is a servant's duty to obey the master's reasonable rules, and if he violates them, and is injured as a proximate result, he is generally held to be guilty of contributory negligence barring a recovery, though there are exceptions to this rule. *Sullivan v. Indianapolis, etc., Traction Co.*, 407, 420 (9).

12. *Injuries to Servant.—Choice of Ways.—Contributory Negligence.*—The court may say as a matter of law that a servant was guilty of contributory negligence in the choice of a way in which to perform his work, where the only reasonable conclusion that can be derived from the facts is that the danger incident to the mode adopted was open and obvious and of a character so imminent and threatening that no man of ordinary prudence would have taken the chances of encountering it; otherwise the question of contributory negligence in such case is for the jury. *Kingan & Co. v. Gleason*, 684, 690 (6).

13. *Injuries to Servant.—Contributory Negligence.*—Where plaintiff, who was injured by cogwheels while he was attempting to oil the machine, started to stop the machine for the purpose of oiling it and was directed by his foreman to oil the machine running, the verdict for plaintiff cannot be disturbed on the theory that plaintiff was guilty of contributory negligence in oiling it while in operation. *Kingan & Co. v. Gleason*, 684, 690 (7).

14. *Injuries to Servant.—Complaint.—Authority of Foreman.*—In an action for injuries to a servant alleged to have occurred

MASTER AND SERVANT—Continued.

while working under the order or direction of an agent or servant of defendant, the complaint must show that such person had authority to give such order or direction.

Jourdan v. Town of Lagrange, 502, 509 (9).

15. Injuries to Servant.—Complaint.—Sufficiency.—Conclusions.—

A complaint containing a general charge of negligence against the master which resulted in the alleged injury to the servant will withstand a demurrer, and mere recitals and conclusions of the pleader as to particular acts will be treated as surplusage.

Evansville Gas, etc., Co. v. Robertson, 353, 358 (1).

16. Injuries to Servant.—Complaint.—Conclusions.—

In an action for injuries received while plowing a street preliminary to paving same, a complaint alleging that defendant knew that there was a plow specially designed for plowing hard streets with safety to those using same, that defendant failed to procure a good and improved plow for said purpose, but furnished an ordinary plow, knowing at the time that it was extrahazardous and dangerous to use a common plow for such purpose, was insufficient as stating mere conclusions, in the absence of averments showing in what respect the plow used was not suitable, or in what manner a different plow would have been better suited.

Jourdan v. Town of Lagrange, 502, 506 (3).

17. Injuries to Servant.—Complaint.—Sufficiency.—

A complaint against an electric company for the death of a servant showing that decedent, in obedience to the order of the foreman under whom he was working, was at work at the top of a light pole on which were wires charged with heavy currents of electricity, which, if a circuit was formed, would produce instant death to one coming in contact therewith, that it was defendant's duty to properly insulate the decedent and otherwise provide for his safety while so engaged, and that defendant knew of the danger to decedent unless he was so protected, but notwithstanding such knowledge negligently failed to insulate and protect him, whereby decedent while in the performance of his work was electrocuted, was sufficient to withstand a demurrer.

Evansville Gas, etc., Co. v. Robertson, 353, 358 (2), 359 (2).

18. Injuries to Servant.—Complaint.—Burden of Proof.—General

Verdict.—Answers to Interrogatories.—Where the complaint in a common-law action by a servant against the master for personal injuries was grounded on defendant's failure to furnish a safe place to work, averring that defendant failed to take proper precautions to protect an embankment which caved and caused the injury, that the character of the place and the condition of the ground was such that the soil was likely to cave in, which defendant knew or could have known in the exercise of ordinary care, and that plaintiff was ignorant of the conditions and relied upon defendant exercising due care for his safety, the burden was upon plaintiff to show knowledge by defendant of the dangerous conditions long enough before the accident to have repaired same or to have warned plaintiff, so that answers to interrogatories showing that defendant had no such knowledge were sufficient to overcome the general verdict for plaintiff.

Egan v. Louisville, etc., Traction Co., 423, 426 (4), 427 (4).

19. Injuries to Servant.—Verdict.—Answers to Interrogatories.—

Complaint.—Every presumption is indulged in favor of the general verdict, and for the purpose of reconciling answers to interrogatories with it, the court on appeal may consider whatever

MASTER AND SERVANT—Continued.

might have been admitted under the issues; hence where the complaint averred that decedent was injured in about fifteen minutes after being temporarily assigned to discharge the duties of another employe, answers by the jury showing that decedent had discharged the duties of such other employe for four days will not be controlling, since evidence was admissible to show that decedent pursued his regular work except at intervals when called upon to discharge a duty of such other employe.

National Fire, etc., Co. v. Smith, 124, 143 (15).

20. Injuries to Servant.—Verdict.—Answers to Interrogatories.—

Where plaintiff averred that at the time of his injury he was performing his service under a special order of defendant's roadmaster, but did not allege that he was directed to do the work at any particular place, a general verdict for plaintiff does not include a finding that he was directed to do the work at the particular place which proved to be dangerous, so that a general verdict for plaintiff was overcome by answers to interrogatories showing that the manner of doing the work was left to plaintiff's discretion.

Egan v. Louisville, etc., Traction Co., 423, 428 (7).

21. Injuries to Servant.—Verdict.—Answers to Interrogatories.—

Where the complaint for the death of a servant who received his injuries while adjusting a belt on a pulley, alleged that decedent had been temporarily assigned to discharge the duties of another servant who was absent, and that putting the belt in question on the pulley was a part of the duty of such absentee's position, answers to interrogatories showing that decedent was not specially directed to put the belt on, and that defendant's officers did not know at the time that he was attempting so to do, are not in conflict with a verdict for plaintiff.

National Fire, etc., Co. v. Smith, 124, 140 (9).

22. Injuries to Servant.—Verdict.—Answers to Interrogatories.—

In an action for the death of a servant whose injuries were received while placing a belt upon a pulley, which work was one of the duties of the employment to which he had been temporarily assigned, answers by the jury to interrogatories showing that the work he was performing was not a part of his regular employment and was more hazardous, and that decedent knew of the worn and defective condition of the belt, and the effect caused by the dressing used upon it, but which did not show that he knew and appreciated the danger of being injured because of the condition of such belt, were not in conflict with a verdict for plaintiff as showing that the dangers were open and obvious and that decedent in the exercise of ordinary care must have known of them.

National Fire, etc., Co. v. Smith, 124, 140 (10).

23. Injuries to Servant.—Verdict.—Answers to Interrogatories.—

In an action for the death of a servant whose injuries were sustained while placing a belt on a pulley, which was a duty connected with work to which he had been temporarily assigned, answers to interrogatories showing that decedent attempted to place the belt while the machinery was in motion will not overcome the general verdict for plaintiff, notwithstanding it was further shown by the answers that defendant had a system of signals and a device for stopping the machinery in such emergencies, where other answers showed that decedent did not know that such device could be so used, that it had not theretofore been used, that it was not the speed of the pulley that caused the injury, that it was the custom to place the belt while the machin-

MASTER AND SERVANT—Continued.

ery was in operation, and that decedent had never been instructed to use the system of signals or the device for stopping the machinery. *National Fire, etc., Co. v. Smith*, 124, 141 (11).

24. *Injuries to Servant.—Verdict.—Answers to Interrogatories.*—In a servant's action for injuries by coming in contact with cogwheels alleged not to have been guarded, answers by the jury to interrogatories from which the court cannot say that the defendant had discharged its duty with respect to guarding such wheels are not in conflict with a general verdict for plaintiff.

Kingan & Co. v. Gleason, 684, 688 (3).

25. *Injuries to Servant.—Cogwheels.—Duty to Guard.*—Where cogwheels are so located and protected by other parts of the machine that injury to a workman while in the discharge of his ordinary duties is not, in view of the danger of accident and mischance usually incident to the employment, reasonably to be anticipated, are properly guarded within the meaning of the statute (§8029 Burns 1908, Acts 1899 p. 231, §9).

Kingan & Co. v. Gleason, 684, 687 (1).

26. *Injuries to Servant.—Duty to Warn Inexperienced Servant.*—Before a master exposes an inexperienced servant to dangers that are not apparent to one of his skill and experience, he is required to warn him thereof and to give him such instructions as will enable him, by the exercise of ordinary care, to avoid injury.

National Fire, etc., Co. v. Smith, 124, 137 (3).

27. *Injuries to Servant.—Cogwheels.—Guards.—Masterial Duty.*—Where a cog gearing is located in close proximity to a portion of the machine which requires oiling, it is the master's duty to provide such guards as will afford protection to the servant, not only while he is engaged in operating the machine, but while he is engaged in oiling it as a part of his employment; hence where it was shown that the cogwheels on which plaintiff was injured while oiling the machine were at the back and lower part of the machine and near the oil tube, the court cannot say that the defendant had discharged its duty with respect to guarding such cogs, although they were to some extent guarded by other parts of the machine.

Kingan & Co. v. Gleason, 684, 688 (2).

28. *Injuries to Servant.—Duty of Master.—Tools and Appliances.*—A master is not obliged to use the most improved appliances in his work, but is only required to use ordinary care to furnish safe appliances; hence a city is not chargeable with negligence in furnishing an employe an ordinary plow to be used in plowing a public street.

Jourdan v. Town of Lagrange, 502, 507 (4).

29. *Injuries to Servant.—Duty of Master.*—An employer, while engaged in the maintenance of highly charged electrical wires on poles that its employes must ascend in the discharge of their duties, is bound to know the natural and ordinary hazards of the work, and must use care commensurate to the danger to eliminate such hazards while its employes, with its knowledge, are engaged in such work. *Evansville Gas, etc., Co. v. Robertson*, 353, 363 (12).

30. *Duty of Master.—Safe Place of Work.*—The duty of a master in respect to the maintenance of a safe working place for its servants, especially when the work is among elements and appliances which are dangerous only in the absence of care on the master's part, imposes on the master the obligation to use active vigilance and care, and liability for a failure in this respect cannot be escaped on the theory that the master did not know that

MASTER AND SERVANT—Continued.

the servant would encounter the danger at the moment of its negligence. *Evansville Gas, etc., Co. v. Robertson*, 353, 364 (13).

31. Master's Duty.—Safe Place of Work.—Delegation of Duty.—

Where the place of work of an electric lineman became dangerous only in the event of the grounding of an uninsulated guy wire that he was attempting to attach to a pole, it was the duty of the master to use care commensurate with the danger to prevent the grounding of such wire, and such duty could not be delegated to a servant so as to allow the master to escape liability.

Evansville Gas, etc., Co. v. Robertson, 353, 364 (14).

32. Duties of Master.—Right of Servant to Rely on Performance of Masterial Duty.—

It is the duty of a master, which he cannot delegate so as to avoid liability, to use ordinary care to provide suitable and safe tools, appliances and machinery for his employe, and to make such reasonable inspection thereof from time to time as the nature of the use and the character of the equipment may require to keep the same in a reasonably safe condition for the intended use, and the employe may rely upon the safety of the equipment provided by the master, except as to such dangers and defects as may be ascertained by an ordinarily prudent man in the exercise of ordinary care.

Sullivan v. Indianapolis, etc., Traction Co., 407, 414 (4).

33. Injuries to Servant.—Action.—Voir Dire Examination of Jurors.—Waiver of Error.—

In an action against an employer for the death of a servant, the error, if any, in permitting counsel for plaintiff to ask each juror on *voir dire* examination if he was either a stockholder, officer, employe or agent of a specified insurance company that had issued a policy to defendant indemnifying it against loss by reason of injury to its employes, was waived by defendant's failing to object to the submission of the cause, to move to set aside the submission, and to save exceptions to the rulings on such motions.

Evansville Gas, etc., Co. v. Robertson, 353, 360 (4).

34. Injuries to Servant.—Evidence.—Jury Question.—

In a motorman's action for injuries in a collision caused by alleged defects in the braking apparatus of his car, where there was some evidence tending to show defects in the brake shoes and brake rods, and the maladjustment of the brake shoes on the wheels, of a character that might have caused the accident, and showing that the accident was not caused by an absence of sand on the tracks, the question of whether the injury was caused by defective brake shoes and rods, preventing the brakes from checking the car when applied, was properly for the jury.

Sullivan v. Indianapolis, etc., Traction Co., 407, 421 (11).

35. Injuries to Servant.—Jury Question.—Latent Defects in Appliances.—

In a motorman's action for injuries from a collision of his car, where there was evidence tending to show that none of the devices for stopping the car worked properly, that incompetent workmen were employed to make repairs, that before the accident repairs were made requiring special skill and experience not possessed by the men making them, together with evidence showing that the braking devices failed to work at the time of the collision, a jury might reasonably have inferred that there were latent defects in the electrical and air-brake appliances which caused the collision, and which were not discoverable by an ordinarily prudent man in the exercise of ordinary care, but

MASTER AND SERVANT—Continued.

which defendant might have discovered in the exercise of ordinary care through inspection by competent men.

Sullivan v. Indianapolis, etc., Traction Co., 407, 421 (12).

36. *Injuries to Employee.—Jury Question.*—In a motorman's action against an electric railway company for personal injuries in a collision caused by alleged defects in the braking apparatus of the car under evidence tending to show that prior to the day of the injury the car had been turned in as defective; that defendant's employees charged with repairing cars were incompetent; that on the evening prior to the injury such employees, in the belief that the car needed repairing, worked on it and, discovering no apparent defect, placed it in position for use; that on the following morning plaintiff was assigned to said car and made a trip to Indianapolis, during which he experienced some difficulty in stopping, which he thought was due to snow and failure of the sand pipes to work properly; that he examined the pipes, removed an obstruction, and found the sand worked properly, and, thinking that such obstruction caused the trouble, made no further examination, and started on the return trip when the collision occurred because of the alleged defects; the questions whether such defects were obvious or ascertainable in the exercise of ordinary care, or whether they were latent and not ascertainable by plaintiff in the exercise of such care, but could have been ascertained by defendant in the exercise of due care, were properly for the jury.

Sullivan v. Indianapolis, etc., Traction Co., 407, 415 (7), 419 (7).

37. *Injuries to Servant.—Knowledge of Defect or Danger.—Pleading.—Proof.*—As a matter of pleading, it is only necessary that the complaint, in a servant's action for personal injuries, should allege that the servant did not know of the alleged defect or danger in order to exclude both actual and implied knowledge on his part; but as a matter of proof to sustain such averment the plaintiff must not only show a want of such knowledge, but that it could not have been acquired by the exercise of ordinary care.

National Fire, etc., Co. v. Smith, 124, 138 (5).

38. *Injuries to Servant.—Knowledge of Danger.—Jury Question.*—Where a servant was injured while performing work to which he had been temporarily assigned, and involving duties and dangers not incident to his regular employment, the question of whether the risks incident to his new duties were visible and could have been ascertained by him in the exercise of ordinary care, or were such as required knowledge or experience to detect, and whether he was ignorant of such dangers, and defendant knew or could have known thereof, were for the jury.

National Fire, etc., Co. v. Smith, 124, 139 (8).

39. *Injuries to Servant.—Master's Liability.—Effect of Rules.*—The rule of an electric railway company requiring motormen to examine their cars and ascertain their fitness before operating them, cannot change the masterial duty to exercise reasonable care to provide a safe place in which to work and safe and suitable equipment, though it is proper evidence along with other evidence bearing on the question of contributory negligence.

Sullivan v. Indianapolis, etc., Traction Co., 407, 419 (8), 420 (8).

40. *Injuries to Servant.—Method of Work.*—In an action for the death of a servant, whose injuries were sustained while placing a belt on a pulley, a showing that for more than a year previous to the accident it had not been customary to stop the machinery to

MASTER AND SERVANT—Continued.

put such belt on the pulley is sufficient to establish that such method had the sanction and approval of the master. .

National Fire, etc., Co. v. Smith, 124, 142 (13).

41. *Injuries to Servant.—Method of Work.*—A master who calls upon an inexperienced servant to discharge hazardous duties not previously required of him, and fails to instruct the servant as to the manner of doing the work, cannot, in case of injury to the servant, complain of the method employed by the servant in attempting to perform the work, where he followed the plan and used the means employed by his superiors with the knowledge of the master; hence where a servant injured in the performance of work to which he had been temporarily assigned, had knowledge of a system of signals, but was not instructed to use them, and it was long the custom known to the master to do the work he was attempting without using same, the fact of such servant's knowledge does not of itself bring the case within the rule applicable where a servant voluntarily chooses the more dangerous of two ways that are open to him, but such knowledge was proper to be considered on the question of contributory negligence.

National Fire, etc., Co. v. Smith, 124, 143 (14).

42. *Injuries to Servant.—Negligence of Fellow Servants.*—An employe injured while engaged in plowing a street cannot recover if the injury resulted from the negligence of fellow servants in the operation of the plow. *Jourdan v. Town of Lagrange*, 502, 508 (8).

43. *Reasonable Care.—Latent Defects.*—Reasonable care on the part of the master demands inspection and search for latent defects and hidden dangers, while such care on the part of the servant requires attention, and observation of obvious perils and defects only, unless the nature of his employment is such as to especially enjoin upon him a higher duty.

Sullivan v. Indianapolis, etc., Traction Co., 407, 420 (10).

44. *Injuries to Servant.—Trial.—Instructions.*—In an action for the death of a servant, the action of the court in setting out the entire complaint in an instruction, on the theory of giving the jury the material allegations thereof, though not in accord with approved practice, was not cause for reversal where it did not appear that appellant was harmed thereby.

Evansville Gas, etc., Co. v. Robertson, 353, 361 (6).

45. *Injuries to Servant.—Trial.—Instructions.*—Where the court, in an action for the wrongful death of a servant, embodied the only remaining paragraph of complaint in its instruction on the material allegations, its failure therein to refer to the questions of contributory negligence and assumption of risk, and its inadvertent statement that the jury should find for plaintiff if the evidence preponderated in her favor, not only in respect to the material allegations of that paragraph, but if the evidence so preponderated as to any of the paragraphs, was harmless in view of other instructions given.

Evansville Gas, etc., Co. v. Robertson, 353, 361 (7).

46. *Injuries to Servant.—Trial.—Instructions.*—In an action for the wrongful death of a servant an instruction setting out certain duties and stating that "a servant does not assume risks flowing from his employer's negligence in these duties", was not erroneous when its full context was considered with the other instructions given.

Evansville Gas, etc., Co. v. Robertson, 353, 362 (10)

MASTER AND SERVANT—Continued.

47. *Injuries to Servant.—Trial.—Instructions.*—In a common-law action by a servant against his employer for damages for injuries caused by defendant's failure to furnish him a reasonably safe place in which to work, whereby he was injured by the falling of an elevator, an instruction that, as the elevator was a freight elevator, the defendant was not required to supply it with a safety device was not pertinent to the issues and was properly refused. *Burford v. Dautrich*, 384, 387 (4).
48. *Injuries to Servant.—Trial.—Instructions.—Proximate Cause.*—In an action by a servant for injuries from the falling of an elevator, an instruction telling the jury that if plaintiff was injured as alleged while in the discharge of his duty as night watchman on entering an elevator that was defective and dangerous as alleged, and was known so to be by the servant whose duty it was to repair and keep same in a safe condition in time to have restored it in safe condition or to have warned plaintiff, the finding should be for plaintiff, provided he had established all the other material allegations of his complaint, and provided he did not know and could not reasonably have known or discovered the defect prior to the injury, and was in no other way chargeable with contributory negligence, was not fatally erroneous as omitting the theory of proximate cause, in view of the fact that it directs the jurors to the charge of negligence in the complaint, which avers that it was the proximate cause of the injury, and in view of another instruction fully covering the question of proximate cause. *Burford v. Dautrich*, 384, 389 (6).
49. *Injuries to Servant.—Trial.—Answers to Interrogatories.*—In a servant's action for injuries from the breaking of a ladder, the jury by its answers to interrogatories showing that persons using the ladder or looking at it from the ground could not see that it was defective, and that plaintiff did not know that it was defective, considered in the light of other answers showing that the ladder was worn and old and in a dilapidated condition and that the rung which broke could be seen by one using the ladder or looking at it from the ground and that the ladder was defective and that the rung broke because worn from use, evidently used the word "defective" as meaning "so weak as to be liable to break", and did not mean to say that one using the ladder or looking at it from the ground could not know its worn, old and decayed condition; hence such interrogatories did not conflict with each other, and the rendition of judgment for defendants thereon was not erroneous. *Beard v. Goulding*, 398, 401 (3).
50. *Injuries to Servant.—Unguarded Cogwheels.—Instructions.*—An instruction that it was defendant's duty to guard the cogwheels of a machine by which plaintiff was injured, if it was practical and possible to do so, was not open to the objection that it required guards even though the wheels were protected by the machinery itself, where such referred to other instruction in which the jury was told that if other parts of the machine afforded a reasonable safeguard they were sufficiently guarded. *Kingan & Co. v. Gleason*, 684, 692 (10).
51. *Injuries to Servant.—Unguarded Cogwheels.—Assumed Risk.—Contributory Negligence.*—Where the negligence charged against defendant consists in a failure to discharge a statutory duty the doctrine of assumed risk does not apply, so that where defendant failed to properly guard certain cogwheels in compliance with §8029 Burns 1908, Acts 1899 p. 231, §9, plaintiff could recover for injuries to his hand in being caught in such cogs notwithstanding

MASTER AND SERVANT—Continued.

he was at the time performing his work in the more hazardous of two ways open to him, unless he was guilty of a want of ordinary care in encountering the known danger, and the verdict in his favor could not be disturbed on the theory of contributory negligence where the evidence upon that point was such that opposite inferences could reasonably be drawn therefrom.

Kingan & Co. v. Gleason, 684, 691 (9).

MASTERIAL DUTY—

See MASTER AND SERVANT 27.

MEASURE OF DAMAGES—

See CARRIERS 3; DEATH 1; TRESPASS 3, 4.

MINES AND MINERALS—

1. *Oil and Gas Leases.—Construction.—Forfeitures.*—An ordinary oil and gas lease will be construed in the light of the fact that its central purpose is that of development, and where forfeiture is provided in case of a failure to develop as stipulated in the lease, such forfeiture will be declared and enforced where the party seeking the relief brings himself within the provisions authorizing same. *Dittman v. Keller*, 448, 451 (3).

2. *Oil and Gas Leases.—Construction.*—Under an oil and gas lease providing that should "the party of the second part feel justified in drilling more than one well, then the parties of the first part are to share equally in all expenses pertaining to the drilling * * * of the same", and that "the price of drilling additional wells shall be at the customary market price for drilling wells in the district", the lessors were not required to tender payment of one-half the cost of a second well as a condition precedent to the right to forfeit the lease for failure to operate for a period of sixty days as therein provided. *Dittman v. Keller*, 448, 451 (4).

3. *Oil and Gas Leases.—Construction.*—A lease of lands for the "sole and only purpose of operating for oil, or gas and mineral" for the period of five years, and as much longer as the premises should be operated for oil and gas, and providing that "if operations for oil or gas cease for a period of sixty days", the lease shall be null and void at lessor's option, is unambiguous and is not subject to the construction that it could be forfeited only at the expiration of sixty days after the full term of five years had expired. *Dittman v. Keller*, 448, 451 (1).

4. *Coal Lease.—Construction.*—A provision in a lease of coal lands that the lessee is to mine sufficient coal "to make the royalty thereon amount to \$600 annually, or in default thereof pay said sum each year, * * * and any sum paid in excess of royalty of coal mined shall be treated as advanced royalty, and shall be deducted out of any excess over \$600 in any year or years thereafter," is not ambiguous as to when the operator is entitled to credit for royalties previously paid, but by its terms gives the right to such credit only where the minimum of \$600 has been paid without mining coal sufficient during the year to amount to that sum, and in a succeeding year the royalty on coal actually mined exceeds \$600, in which event a credit may be had on such excess of the difference between the amount of royalty for coal actually mined in such previous year and the \$600 actually paid. *Vandalia Coal Co. v. Underwood*, 91, 97 (3), 98 (3).

MINES AND MINING—

1. *Coal Lease.—Action for Royalties.—Findings.*—In an action to recover royalty due under a coal lease providing for a minimum sum to which the lessor was entitled each year, where it was found that coal was mined during a certain year which produced royalty in a sum less than such minimum, and that the coal was not exhausted when operations ceased, the further finding that the mine could not be operated at a profit, would not prevent a recovery of such minimum rental.

Vandalia Coal Co. v. Underwood, 91, 99 (7).

2. *Coal Lease.—Action for Royalties.—Findings.—Conclusions of Law.*—In a lessor's action on a coal lease providing that the lessee should mine sufficient coal each year to make the royalty amount to \$600 annually, and in default thereof to pay said sum each year, and that any sum paid in excess of royalty of coal mined should be treated as advanced royalty and be deducted from any excess over \$600 in any year thereafter, where the court found that for a certain year the royalty on coal mined amounted to only \$245.86, which was the sum paid, and that for the previous year the royalty amounted to \$838, which sum was paid, a conclusion of law stated thereon that there was due plaintiff the sum of \$354.14 as unpaid annuity for the last year was not erroneous, but strictly in accordance with the terms of the lease.

Vandalia Coal Co. v. Underwood, 91, 98 (5).

MISREPRESENTATION—

By guardian, see GUARDIAN AND WARD 11.

MISTAKE—

See BILLS AND NOTES 12; PAYMENT 1.

MODIFICATION—

See JUDGMENT 9.

MOOT QUESTIONS—

See APPEAL 1, 2.

MORTGAGES—

See CHATTEL MORTGAGES; HUSBAND AND WIFE 5-7.

1. *Assumption of Payment.—Deed.—Construction.*—Where a deed conveying land to plaintiff recited that "the grantors convey to the grantee all shelving, gas fixtures, except * * * this conveyance is made subject to a mortgage held by * * *, Also street assessments against the lots for street improvements which grantee agrees to assume," the grantee must be held to have assumed the payment of the mortgage, since the effect that might otherwise have prevailed from the fact that the word "also" in the provision for the assumption of street assessments began with a capital is nullified by the fact that it is preceded by a comma, and that the language is fairly open to the construction that the payment of the mortgage was assumed.

Heaton v. Grant Lodge, etc., 100, 110 (8).

2. *Deeds as Security.—Redemption from Purchaser.*—Redemption from a deed absolute in form, but given merely as security for a debt, may be made by the heirs of the grantor against persons buying from the grantee with knowledge of the facts.

Drebing v. Zahrt, 492, 497 (5).

MORTGAGES—Continued.

3. *Foreclosure.—Answer.—Sufficiency.—Negligence in Recording Chattel Mortgage.*—In an action to foreclose a mortgage, an answer averring that plaintiff had been given a chattel mortgage which was to be the primary security, and that because of plaintiff's negligence in recording the same the lien thereof was lost, was insufficient to constitute a defense to the action, where it also appeared that because of an invalid acknowledgment such chattel mortgage was not entitled to record, since actionable negligence can not be predicated on any delay or neglect in filing an instrument for record where the act of recording can give it no added efficacy. *Guyer v. Union Trust Co.*, 472, 486 (6).
4. *Foreclosure.—Interests Barred.—Rights Under Lease for Term of Years.*—While a judgment by default foreclosing a mortgage against one who was properly made a party to the action, and duly served with process, and required to answer as to any interest he might have or claim in the premises, will be conclusive as to any prior claims of interest or title adverse to the plaintiff, only claims of interest or title made by such party in or to the property which is the subject of the foreclosure are thus concluded, and such a suit would not challenge him to answer or defend against a claim of interest in some other or different property from that covered by the mortgage in suit; hence the rights of the occupant of a building erected for its use under a contract which in effect was a lease for a term of years, who joined in the execution of a mortgage on the premises, were not barred by a default judgment in foreclosure of the mortgage, where the complaint in the foreclosure suit merely described the real estate, and neither it, the mortgage, nor the note in any way mentioned such contract. *Heaton v. Grant Lodge, etc.*, 100, 107 (4), 100 (4).
5. *Property Subject.—Leases.*—A lease for a term of years may be mortgaged, and may be included in a mortgage given on the real estate which it covers, but, in order that it may be so covered and included in a mortgage, it must appear from the mortgage that the parties intended to so include it. *Heaton v. Grant Lodge, etc.*, 100, 109 (6).
6. *Rights of Purchasers at Foreclosure Sale.—Estoppel.—Effect as to Coparties.—Appeal.*—Where an appellant, claiming under a purchaser at a foreclosure sale, was by virtue of a prior deed from the mortgagor in which he assumed the payment of the mortgage, estopped from asserting any rights superior to those of the mortgagor as against the right of possession by a tenant of the mortgagor under a lease for years, who with the mortgagor was defaulted in the foreclosure suit, such estoppel operates to prevent a reversal as to his coappellants, claiming under such purchaser at the foreclosure sale, who, on the theory that they were tenants in common with him, joined him in an action against the tenant of such mortgagor to quiet their title. *Heaton v. Grant Lodge, etc.*, 100, 111 (10).

MOTIONS—

See PLEADING.

MUNICIPAL CORPORATIONS—

1. *Ministerial Functions.—Street Paving.*—In prosecuting the details of the work of paving a street a city performs a mere ministerial duty, and not one enjoined upon it as a subdivision of the

MUNICIPAL CORPORATIONS—Continued.

State; hence it is not exempt from liability for injuries to its employe by its negligence in the prosecution of such work.

Jourdan v. Town of Lagrange, 502, 506 (2).

2. *Negligence.—Complaint.—Demurrer.*—In an action against a town for injuries to an employe while at work on its streets, where the complaint was on the theory that the rule *respondeat superior* applied to the facts set out, objections on demurrer thereto that the town could not be liable for the reason that it is a subdivision of the State and was at the time performing a State function were not applicable.

Jourdan v. Town of Lagrange, 502, 506 (1).

3. *Officers. — Removal. — Statutory Provisions.*—The Cities and Towns Act (Acts 1905 p. 278, §8883 *et seq.* Burns 1908) covers the whole subject of municipal legislation, and is a complete revision of the law for the government of cities and towns, and in view of §272 of the act (§9016 Burns 1908) repealing all former laws within the purview of the act, §240 thereof (§8894 Burns 1908) providing for the removal of the mayor and other officer of any city or town on conviction for oppression, malconduct or misfeasance in office, supersedes §9662 Burns 1908, Acts 1897 p. 278, §35, relating to the removal of officers generally.

State, ex rel. v. Schlicker, 318, 319 (1), 321 (1), 323 (1).

4. *Powers of Common Council.—Ordinances and Resolutions.—Statutes.*—The provision of §52 of the Cities and Towns Act (Acts 1905 p. 219, §8654 Burns 1908) that all ordinances, orders and resolutions must be signed by the mayor or passed over his veto by a two-thirds vote of the members-elect of the common council, as well as that of subd. 9, §80, of the same act (§9682 Burns 1908) making it the duty of the mayor to approve or disapprove every ordinance or resolution of the common council, refers only to ordinances, orders, resolutions and motions for the government of the city, for the control of its property and finances, and for the appropriation of money, which the common council, by the first part of said §52 is authorized to pass.

Fry v. Seely, 670, 674 (1).

5. *Public Improvements.—Negligence.*—Placing an eight-inch sewer pipe fifteen inches under the ground in a public street is not negligence rendering the city liable for injuries to an employe engaged in plowing the street, caused by the plow coming in contact with such pipe. *Jourdan v. Town of Lagrange*, 502, 508 (7).

6. *Public Improvements.—Adoption of Resolutions.—Approval by Mayor.—Statutes.*—Under §107 of the Cities and Towns Act (Acts 1907 p. 412), providing that resolutions for street improvements shall be adopted by the board of public works, it is not contemplated that an improvement resolution shall be approved by the signature of the mayor in order to become operative, but exclusive jurisdiction in such matter, except in the event of remonstrance, is vested in the board of public works; and since §265 of said act (§8959 Burns 1908) provides that in cities of the fifth class the duties of the board of public works shall be performed by the common council, an improvement resolution adopted by such common council occupies the same legal status as a similar resolution by a board of public works, and hence need not be signed by the mayor to be operative. *Fry v. Seely*, 670, 674 (2).

NAMES—

Corporate, see **TRADE-MARKS AND TRADE-NAMES** 12.

Descriptive and generic, see **TRADE-MARKS AND TRADE-NAMES** 14.

NEGLIGENCE—

See ATTORNEY AND CLIENT; CARRIERS 4; CONTRIBUTORY NEGLIGENCE; MUNICIPAL CORPORATIONS 2, 5; STREET RAILROADS 6; TRIAL 12.

Of commissioners, see DRAINS 2.

Of fellow servants, see MASTER AND SERVANT 42.

Of makers, see BILLS AND NOTES 4.

In recording chattel mortgage, see MORTGAGES 3.

1. *Action.—Pleading.*—In common-law actions founded upon negligence the negligence relied on must be charged in terms, or facts must be averred sufficient to compel the inference of negligence constituting the proximate cause of the injuries sustained.

Jourdan v. Town of Lagrange, 502, 508 (6).

2. *Answers to Interrogatories.—Verdict.—Contributory Negligence.*—In an action for personal injuries from the fall of a scaffold erected by defendant for the use of plaintiff in placing a certain hopper for defendant, answers by the jury to interrogatories showing that he saw the scaffold erected, that after he went on it he heard it crack with a sound as though breaking, that he then made an examination to see if it was strong enough to bear the strain of raising the hopper, said he believed it was all right, and then went ahead with the work, and also showing that he was not familiar with the construction of scaffolds and was incompetent to discover that the scaffold was weak or defective by examination thereof either before or after going on same, do not show that plaintiff was guilty of contributory negligence, and are not in conflict with the general verdict for plaintiff.

Talge Mahogany Co. v. Hockett, 303, 308 (4).

3. *Contributory Negligence.—Burden of Proof.—Instructions.*—Under §362 Burns 1908, Acts 1899 p. 58, the defendant in a personal injury case has the burden of proving contributory negligence by a preponderance of the evidence, and if the evidence on that issue is evenly balanced the finding thereon should be for plaintiff; hence an instruction that "the failure of the evidence to show by a fair preponderance that the plaintiff was free from contributory negligence would absolve the defendant from liability even though guilty of negligence" was erroneous.

Nelson v. Chicago, etc., R. Co., 373, 374 (1).

4. *Contributory Negligence.*—Contributory Negligence consists of such conduct on the part of plaintiff, characterized by the want of such care as a person of ordinary prudence would exercise under like circumstances, which directly contributes to produce the injury of which he complains.

Kingan & Co. v. Gleason, 684, 689 (5).

5. *Contributory Negligence.—Question of Law and Fact.*—The question of contributory negligence is usually a mixed question of law and fact; being a pure question of law only when the facts are undisputed and inferences deducible therefrom lead to but one conclusion, and a question of fact for the jury where the facts are controverted, or are such as are susceptible to different inferences by reasonable minds.

Virgin v. Lake Erie, etc., R. Co., 216, 224 (9).

6. *Contributory Negligence.—Jury Questions.*—When the question of negligence or contributory negligence is one of fact, or mixed law and fact, it is to be determined by the jury under proper instructions as to the law.

Virgin v. Lake Erie, etc., R. Co., 216, 225 (13).

NEGLIGENCE—Continued.

7. *Pleading.—Complaint.—Sufficiency.*—A complaint in a personal injury case charging a duty on the part of defendant to protect the plaintiff from the injury complained of, a failure to perform such duty, and an injury resulting therefrom, sufficiently states a cause of action. *Burford v. Dautrich*, 384, 387 (1).
8. *Presumptions.—Trial.—Instructions.*—Proof that all the instrumentalities causing an injury were under the exclusive control and management of defendant, that the accident was such as ordinarily would not have occurred if due care had been exercised by defendant, and that a duty to exercise such care was owing the plaintiff from defendant, casts upon the defendant the presumption of negligence and the burden of explaining the accident consistent with due care on his part; hence an instruction that if defendant was to erect a scaffold to be used by plaintiff in placing a certain hopper for defendant, and knew the approximate weight of such hopper and was informed of the number of men that would be required on such scaffold, and accordingly caused the scaffold to be constructed, and that such scaffold broke and fell with plaintiff while he was in the act of placing such hopper, the jury could infer negligence in the construction, in the absence of other evidence as to the cause of the accident, was not objectionable as placing on defendant the burden of proving that it was not negligent. *Talge Mahogany Co. v. Hockett*, 303, 306 (2).

NEGOTIABLE INSTRUMENTS—

See **BILLS AND NOTES.**

NEW TRIAL—

See **APPEAL 39.**

How causes for, may be waived on appeal, see **APPEAL 56.**

Necessity for motion for, see *Appeal 25-27.*

Ruling on motion for, see **APPEAL 24, 118, 119.**

Overruling motion for, see **APPEAL 14, 41.**

Ruling on supplemental motion for, see **APPEAL 42.**

1. *Cause Discovered After Term.—Statutes.*—Section 589 Burns 1908, §563 R. S. 1881, providing that application for a new trial may be made by complaint not later than the second term after discovery of the cause therefor, nor more than one year after the final judgment was rendered, was intended to apply only to cases where the causes were discovered after the trial term and beyond the time allowed for the filing of a motion for new trial. *Fisher v. Southern R. Co.*, 599, 603 (3).
2. *Grounds.—Surprise.*—Surprise at the testimony of an adversary witness, legally admissible under the issues, is at most but ground for a continuance, and not cause for a new trial. *Kyger v. Stallings*, 196, 202 (8).
3. *Motion.—Effect of Supplemental Motion.*—Where the original motion for a new trial is pending, a supplemental motion filed within the time allowed for filing the original motion becomes a part of such original motion. *Fisher v. Southern R. Co.*, 599, 603 (5).
4. *Motion.—Additional Causes.—Withdrawal of Motion.*—An applicant for a new trial may withdraw his motion and file a new motion containing additional causes within the time allowed for filing the original motion. *Fisher v. Southern R. Co.*, 599, 603 (4).

NEW TRIAL—Continued.

5. *Supplemental Motion.—Time for Filing.*—At any time during the term at which a verdict or decision was rendered, a party may be permitted, on proper showing, to file a supplemental motion for new trial, or additional causes, which by due diligence he did not discover until after filing the original motion.

Fisher v. Southern R. Co., 599, 602 (1).

6. *Supplemental Motion.—Time for Filing.*—Under §1, Acts 1911 p. 604, which provided that a motion for a new trial could be made on or before the second Monday of the next term of court where the verdict or decision was rendered during the last ten days of the preceding term, a party against whom a verdict had been rendered less than ten days before the close of a term, and who on the same day filed a motion for new trial, was entitled to file a supplemental motion on the first judicial day of the succeeding term for a cause discovered after the trial term and not stated in his original motion.

Fisher v. Southern R. Co., 599, 602 (2), 603 (2).

NOMINAL DAMAGES—

Failure to award, see DAMAGES 1.

NON EST FACTUM—

See BILLS AND NOTES 10; PLEADING 14.

An answer of, raises the issue of nonexecution, see BILLS AND NOTES 5.

NOTICE—

See COVENANTS 1; DRAINS 1.

OCCUPATION—

See DIVORCE 3, 8, 13.

OFFICERS—

See CORPORATIONS 1; MUNICIPAL CORPORATIONS 3.

ORDINANCES—

See MUNICIPAL CORPORATIONS 4.

PARENT AND CHILD—

Neglect of Children.—Findings.—A finding of facts showing that defendant was a married woman, the mother of two children under fourteen years of age, that her husband was employed in another town, that during his absence she visited wine rooms until late at night and brought a man home with her on several occasions, and had sexual intercourse with him for hire until a late hour in a room near where her young children were, and on one occasion had sexual intercourse with him while her seventeen-year-old daughter was having such intercourse with another man in the same room, and that she practically made a house of prostitution of her apartments, was sufficient to show that defendant's children were neglected, and that she contributed to their neglect, within the meaning of §§1643, 1645 Burns 1908, Acts 1907 p. 59, defining a neglected child and providing for the punishment of any person who encourages, counsels or contributes to the neglect of a child.

Nunn v. State, 37, 39 (1).

PAROL—

Evidence, see EVIDENCE 10.

PARTIES—

See JUDGMENT 1; PLEADING 9; TRUSTS 3.

Duty of, see TRIAL 8.

Defect in name of, see APPEAL 46.

Failure to set out names of, see APPEAL 43.

Designation.—Surplusage.—Where the plaintiff in an action to foreclose a mortgage was designated in the caption of the complaint as trustee, and the facts alleged showed that plaintiff was the real owner of the debt and the mortgage securing it, the use of the term trustee must be regarded as *descriptio personae* and therefore mere surplusage that could not affect the finding and judgment for plaintiff. *Guyer v. Union Trust Co.*, 472, 490 (13).

PARTITION—

Fence, see FENCES.

PASSENGERS—

Injuries to, see CARRIERS 3, 4.

PAYMENT—

See BILLS AND NOTES 11, 12; WORDS AND PHRASES.

Part, see ACCORD AND SATISFACTION.

Of taxes though voluntarily made can not be recovered, see TAXATION 5.

1. *Mistake.—Evidence.—Sufficiency.*—Where plaintiff testified that, on the delivery to him of checks in a certain amount in payment of a note of a less amount, he cancelled the note and delivered it to defendant together with what he believed was the correct change, that thereafter on the same day he discovered a shortage in his cash and discovered from a memorandum used in calculating the amount due on the note that he had made a mistake in subtraction, thus tracing such shortage to the overpayment of defendant, a verdict for plaintiff had some evidence to support it, and cannot be disturbed on appeal on the ground that the evidence was insufficient. *Morris v. Reyman*, 112, 114 (1).

2. *Payment in Full.—Evidence.—Sufficiency.*—In an action by the administratrix of the estate of a deceased assignee, to recover on a contract to hoist or dip gravel, evidence on behalf of plaintiff showing the contract and assignment, that gravel worth at the contract price \$1,056 had been delivered, that only \$528 had been paid, and that there was due the sum of \$528, was sufficient to warrant a finding that the payment made was not a payment in full, notwithstanding evidence that at the time of such payment the assignee surrendered to defendant the power of attorney executed by the original contractor authorizing the assignee to collect all amounts due under the contract, since such evidence was consistent with the theory that the surrender was made to protect defendant against any claim by the original contractor, rather than with the theory that it was equivalent to a surrender of the evidence of the debt. *Todd v. Guffin*, 605, 610 (3).

PENALTIES—

For nonpayment of taxes, see TAXATION 2, 3.

PEREMPTORY INSTRUCTIONS—

See GUARDIAN AND WARD 7.

PERSONAL PROPERTY—

See LANDLORD AND TENANT 2.

PERSONS—

Entitled to maintain action, see GUARDIAN AND WARD 13.

Injuries to, on tracks, see STREET RAILROADS 1-6.

Rights of, on highway, see RAILROADS 15, 17.

PLEADING.

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|------------------------------|-------------------|
| I. FORM AND ALLEGATION, 1-4. | IV. DEMURRER, 18. |
| II. COMPLAINT, 5-13. | V. MOTIONS. |
| III. ANSWER, 14-17. | |

See BILLS AND NOTES 14; EVIDENCE 3, 4; NEGLIGENCE 1; REPLEVIN 4, 5.

Review as to, see APPEAL 98-101.

I. FORM AND ALLEGATION.

1. *Determining Sufficiency.*—In determining the sufficiency of a pleading, the substance, rather than the form or the name that has been given to it by the pleader, is the controlling factor.
Drebing v. Zahrt, 492, 494 (2).
2. *Theory.—Sufficiency.*—A pleading should proceed on a certain and definite theory, and its sufficiency should be judged and determined on that theory.
Euler v. Euler, 547, 553 (1).
3. *Theory.—Determination.*—The theory of a pleading must be determined by a consideration of its general scope and tenor, and the construction and theory adopted by the trial court will be adhered to on appeal, if it is susceptible to such construction and theory.
McKinley v. Britton, 21, 24 (2).
4. *Theory.*—A pleading should proceed on a certain definite theory and its sufficiency must be determined on that theory.
McKinley v. Britton, 21, 24 (1).

II. COMPLAINT.

See CONTRACTS 1, 7; CONVERSION 4, 5; DEATH 2; DIVORCE 2-9; EXECUTORS AND ADMINISTRATORS 1; FENCES; GUARDIAN AND WARD 4, 6, 8, 10, 13; MASTER AND SERVANT 14-19, 37; MUNICIPAL CORPORATIONS 2; NEGLIGENCE 7; SCHOOLS AND SCHOOL DISTRICTS 1, 2; TAXATION 2, 6, 7; TRADE-MARKS AND TRADE-NAMES 15; TRUSTS 1, 3, 5; WORK AND LABOR.

Leave to amend, see APPEAL 132.

Sufficiency of, see APPEAL 155.

5. *Theory.*—A complaint framed upon a definite theory ascertainable from a consideration of its averments, must be good upon that theory or it will be held insufficient.
National Fire, etc., Co. v. Smith, 124, 136 (2).
6. *Theory.*—The theory of a complaint must be determined from a consideration of its leading averments and its general scope and

PLEADING—Continued.

tenor, and the theory most apparent and clearly outlined will be adopted rather than any possible theory that may be indicated by a consideration of detached parts and fragmentary statements, or by the conclusions of the pleader.

National Fire, etc., Co. v. Smith, 124, 136 (1).

7. *Initial Attack After Verdict.*—A complaint, attacked for the first time after verdict, will be held sufficient if it does not wholly omit some essential averment and is sufficient to bar another action for the same cause.

Cleveland, etc., R. Co. v. Champe, 243, 246 (1).

8. *Initial Attack on Appeal.*—The sufficiency of separate paragraphs of complaint cannot be questioned for the first time on appeal, but the question must be raised by demurrer and exception and be presented on appeal by assigning error on the ruling on such demurrer. *Illinois Surety Co. v. State, ex rel.*, 31, 34 (1).

9. *Parties.*—A complaint in which more than one plaintiff joins must state a cause of action in favor of all the parties joining therein to be sufficient against a demurrer for want of facts.

Wheatcraft v. Wheatcraft, 283, 287 (2).

10. *Omissions.—Cure by Answer.*—The omission, in a complaint to set aside the settlement of a guardian, to allege that his reports and final settlement had been approved, was cured by defendant's answer alleging such filing and approval.

Euler v. Euler, 547, 559 (13).

11. *Amended Complaint.—New Cause of Action.*—Whether an amended complaint sets up a new cause of action may be determined by a determination of the question whether a recovery on the original complaint would bar a recovery under the amended pleading. *United States, etc., Ins. Co. v. Emerick*, 591, 598 (5).

12. *Waiver of Conditions Precedent.—Sufficiency of Averments.*—Under §376 Burns 1908, §376 R. S. 1881, relating to pleading the performance of conditions precedent contained in a contract sued on, the general averment that all the conditions precedent had been performed before the bringing of the action is sufficient, but if the general averment is not relied on, the acts constituting the performance must be set out with particularity, and if a waiver is charged the facts constituting the waiver must be set out.

Indiana Life, etc., Co. v. Patterson, 291, 295 (1).

13. *Allegations.—Sufficiency.*—The allegation, in a complaint for the death of a servant by contact with an electric wire, that "it was necessary for said deceased to be in close proximity to said feed wire", when considered with other allegations that the pole on which decedent was at work "carried a feed wire that was so heavily charged with electricity that to come in contact with the same so as to form a circuit would destroy human life; that the presence of said feed wire and its effect upon human life were known to defendant", and disclosing that decedent was ordered to go upon the pole to attach a guy wire to a cross arm, was sufficiently clear to enable the court to understand that decedent was required to be near the feed wire attached thereto.

Evansville Gas, etc., Co. v. Robertson, 353, 359 (3).

III. ANSWER.

See **BILLS AND NOTES** 2; **HUSBAND AND WIFE** 9, 10.

Of suretyship, see **HUSBAND AND WIFE** 3.

14. *Non Est Factum.—Sufficiency.*—An answer in *non est factum*, to be sufficient, must deny the execution of the instrument under

PLEADING—Continued.

oath in terms so certain and specific as to warrant a conviction of perjury upon proof of the execution of the instrument.

Bombolaski v. First Nat. Bank, 172, 188 (7).

15. *Admissions.—Facts Not Denied.*—Under §392 Burns 1908, §383 R. S. 1881, matters well pleaded in a complaint, and not controverted in the answer, must be taken as true in testing the sufficiency of the answer. *Taylor v. Griner*, 617, 619 (2).

16. *Counterclaim.—Demurrer.*—In an action to quiet title, a pleading, designated as an answer, which stated facts showing that defendants were the owners of the equitable title to the real estate in controversy, and asked for affirmative relief, was in fact a counterclaim and its sufficiency could be properly challenged only by demurrer for want of facts sufficient to constitute a cause of action. *Drebing v. Zahrt*, 492, 494 (1).

17. *Former Adjudication.*—In an action for the foreclosure of a mortgage, where defendants claimed that plaintiff had been given a chattel mortgage which was to be the primary security, and that because of plaintiff's negligence in recording the same the lien thereof was lost, an answer setting up the judgment in an assignment proceeding by which plaintiff was precluded from any security under such chattel mortgage, was insufficient to present an issue of former adjudication as to such question of negligence, in the absence of averments as to who were parties to the proceeding, or as to what the issues were, or that any issue was formed on the question of whether such chattel mortgage was filed within the time required by statute.

Guyer v. Union Trust Co., 472, 483 (3).

IV. DEMURRER.

See EXECUTORS AND ADMINISTRATORS 1; LIMITATION OF ACTIONS 2; MUNICIPAL CORPORATIONS 2.

To answer, see APPEAL 127, 128.

Ruling on, see APPEAL 48.

Ruling on, to complaint, see APPEAL 129-131.

Ruling on defective, see APPEAL 121.

18. *Demurrer to Answer.—Form.*—A demurrer to an answer on the ground that it does "not state facts sufficient to constitute an answer", does not present the question of the sufficiency of the facts stated to constitute a cause of defense.

Baker v. Bundy, 272, 276 (1).

V. MOTIONS.

To suppress deposition, see DEPOSITIONS 1.

POSSESSION—

Of chattels, see CHATTEL MORTGAGES 3.

PRESUMPTIONS—

See APPEAL 102-103; BILLS AND NOTES 6; CHATTEL MORTGAGES 2; EVIDENCE 6, 8; JURY 3; NEGLIGENCE 8; RAILROADS 1, 2; TAXATION 9.

PRINCIPAL AND AGENT—

1. *Authority of Agent.—Evidence.—Sufficiency.*—The testimony of an agent that he had authority to purchase goods for his principal is sufficient to sustain a decision for plaintiff in an action against the principal for a breach of the contract of purchase.
Buttz v. Warren Mach. Co., 347, 348 (4).
2. *Death of Agent.—Agency Coupled With an Interest.*—An agency is not terminated by the agent's death where the power is coupled with an interest, so that where an agent held a power of attorney from the original contractor to complete a contract for holsting or dipping gravel and to collect the money therefor, the power, being coupled with an interest, did not terminate on the agent's death, and his administratrix could recover any amount due under such contract. *Todd v. Guffin*, 605, 609 (2).
3. *Testimony of Agent.—Admissibility.*—The rule that the declarations of an alleged agent are not admissible against the alleged principal to prove the fact of agency does not disqualify an agent from testifying as to the authority given him by his principal, and the extent and character thereof, where such authority is verbal. *Buttz v. Warren Mach. Co.*, 347, 348 (2).

PRINCIPAL AND SURETY—

Action Against Surety.—Laches.—Where notes held by a bank upon which a decedent was surety became due in April and May following the death of decedent in November, and active efforts for the collection of the notes began early in the year succeeding the year of their maturity, and prior to the institution of suit thereon various deposits were made in plaintiff bank to the credit of the principals thereon, the delay in suing together with plaintiff's failure to apply such deposits to the payment of the notes did not constitute *laches* preventing a recovery against the surety's estate. *Patterson v. State Bank, etc.*, 331, 338 (9).

PROPERTY—

See MORTGAGES 5.

Abandonment of, see SCHOOLS AND SCHOOL DISTRICTS 6.

Description of, see REPLEVIN 1.

Purchase of, see JUDGMENT 1.

Value of, see EVIDENCE 1.

Covered by mortgage, see CHATTEL MORTGAGES 5.

PROOF—

See HUSBAND AND WIFE 9.

Failure of, see APPEAL 156.

PROXIMATE CAUSE—

See MASTER AND SERVANT 48.

PUBLIC IMPROVEMENTS—

See MUNICIPAL CORPORATIONS 5, 6.

"PUBLIC POLICY"—

See WORDS AND PHRASES 2; BUILDING AND LOAN ASSOCIATION 2.

PUPILS—

Action for cost of transporting, see SCHOOLS AND SCHOOL DISTRICTS 2.

Recovery for transportation of, see SCHOOLS AND SCHOOL DISTRICTS 3.

"PURVIEW"—

See WORDS AND PHRASES 3.

QUALIFICATION—

Of witnesses, see DIVORCE 17.

QUESTIONS FOR JURY—

See MASTER AND SERVANT 34-36, 38; NEGLIGENCE 6; STREET RAILROADS 3, 6.

QUIETING TITLE—

See CANCELLATION OF INSTRUMENTS.

1. *Burden of Proof.—Cotenants.*—A tenant in common, by joining another in an action to quiet their common title, undertakes the burden not only of proving title in himself, but also title in his cotenant. *Heaton v. Grant Lodge, etc.*, 100, 111 (11).
2. *Counterclaim.—Sufficiency.*—In an action to quiet title, a counterclaim alleging that the real estate had been conveyed to plaintiff's grantor by the father of defendants with an agreement for a reconveyance upon the payment of certain indebtedness to plaintiffs' grantor, that long after such conveyance plaintiffs' grantor and the father of defendants disagreed as to the state of their accounts and that no complete settlement was ever had, that after such disagreement, but long before the conveyance to plaintiffs, such agreement for reconveyance was placed of record, and that plaintiffs purchased with full knowledge of the facts, and praying that the deed be declared a mortgage and for a reconveyance to defendants, the sole heirs of their father, on payment by them of the amount due, was sufficient to withstand a demurrer. *Drebing v. Zahrt*, 492, 495 (4), 497 (4).
3. *Proof Required.—Burden.*—By a complaint in ordinary form to quiet title, plaintiff assumes the burden of proving not only his title to the real estate in controversy, but that the defendant is, without right, claiming and asserting some title to or interest in such real estate adverse to that of plaintiff. *Heaton v. Grant Lodge, etc.*, 100, 107 (3).

QUITCLAIM—

Deed, see DEEDS 4, 5; VENDOR AND PURCHASER 1.

RAILROADS—

Construction of, see MASTER AND SERVANT 4.

Tax in aid of, see TAXATION 3.

1. *Crossing Accidents.—Presumptions.*—It will be presumed that one injured in attempting to cross a railroad track saw and heard that which he could have observed in the exercise of ordinary care. *Virgin v. Lake Erie, etc., R. Co.*, 216, 222 (4).
2. *Crossing Accidents.—Presumptions.—Contributory Negligence.*—In an action for the death of one killed at a railroad crossing,

RAILROADS—Continued.

the law indulges no presumptions as to the negligence of the defendant or the contributory negligence of the injured party.

Cleveland, etc., R. Co. v. Champe, 243, 249 (4).

3. *Crossing Accidents—Contributory Negligence.—Determination.—Acts or Omissions of Company.*—Obstructions placed by a railroad company on its tracks, its failure to signal the approach of its train to a crossing, or to perform any other duty it owes to a person lawfully on the highway, are often important elements to be considered in determining the question of contributory negligence. *Virgin v. Lake Erie, etc., R. Co.*, 216, 224 (7).
4. *Crossing Accidents.—Contributory Negligence.—Instructions.*—In an action for injuries by being struck by a train at a highway crossing, an instruction on the question of contributory negligence, stating that if plaintiff could not see or hear the train without stopping, and he did not stop, look and listen, he was guilty of contributory negligence, regardless of any obstructions, of negligent omissions or conduct on the part of defendant, and one stating that if plaintiff could not, while his wagon was in motion, learn of the approach of the train, his failure to stop raises a presumption of contributory negligence authorizing a finding for defendants, were each erroneous in that they invaded the province of the jury.
Virgin v. Lake Erie, etc., R. Co., 216, 226 (14).
5. *Crossing Accidents.—Looking and Listening.*—The law cannot arbitrarily determine the place or distance from the track, where one approaching a crossing must look and listen, but the sufficiency of precautions taken in a given case must be determined from a consideration of whether, under the particular circumstances, the person approaching the track exercised ordinary care in selecting the place and in looking and listening.
Virgin v. Lake Erie, etc., R. Co., 216, 224 (6).
6. *Crossing Accidents.—Ordinary Care.—Duty to Stop and Look and Listen.*—While a traveler on a public highway must always use ordinary care in attempting to pass over a railroad crossing, the question of whether he must stop before attempting to pass over it depends upon the facts of each particular case, and it cannot be said that in each case ordinary care requires that he should stop. *Virgin v. Lake Erie, etc., R. Co.*, 216, 225 (10).
7. *Crossing Accidents.—Grade Crossings.—Ordinary Care.*—Since a railroad crossing at grade is a known place of danger, one approaching same and attempting to cross must use such care and prudence, proportionate to the known danger, as an ordinarily prudent and cautious person would use under like circumstances and conditions, to avoid injury.
Virgin v. Lake Erie, etc., R. Co., 216, 222 (3).
8. *Crossing Accidents.—Care Required in Approaching Crossing.—Ordinary Care.*—While one approaching and attempting to cross a railroad track must always use ordinary care under the circumstances existing at the time and place, he is not chargeable with a higher degree of care on account of any obstructions, wrongful conduct, or failure on the part of the company to discharge any duty incumbent upon it; and where a railroad company by obstructions, or other negligent acts or omissions, makes a crossing more hazardous to persons desiring to use the highway, it must use such care and give such warnings of the approach of trains as are commensurate with such increased hazard.
Virgin v. Lake Erie, etc., R. Co., 216, 223 (5).

RAILROADS—Continued.

9. *Crossing Accidents.—Conditions Misleading to Traveler.*—Where the conditions at a railroad crossing are indicative of unusual danger to one attempting to cross, such person must use care proportionate to the danger; but if the conditions are misleading and give to him a sense of security, when he is actually in danger, he is not held to that strict accountability applicable under ordinary conditions.
Virgin v. Lake Erie, etc., R. Co., 216, 225 (12).
10. *Crossing Accidents.—Failure to Give Signals.—Rights of Person Approaching Crossing.*—While the failure of a railroad company to give warning of the approach of its train to a highway crossing does not relieve a traveler on the highway from the duty of exercising ordinary care in attempting to cross, he may, in the exercise of such care, rely upon the giving of the warnings required by law. *Virgin v. Lake Erie, etc., R. Co.*, 216, 224 (8).
11. *Crossing Accidents.—Failure to Sound Whistle.—Instructions.*—In an action for injuries from being struck by a train at a highway crossing, an instruction that if the station was less than eighty rods from the place of the accident, there was no law of the State requiring the sounding of the whistle between the station and the crossing where the accident occurred, was misleading, since the statutory requirements are not in every instance the full measure of the care required in the operation of trains, and the jury probably understood therefrom that defendant was not required to give any warning of the approach of the train to the crossing after it left the station.
Virgin v. Lake Erie, etc., R. Co., 216, 228 (16).
12. *Crossing Accidents.—Duty of Person Attempting to Cross.—Instructions.*—An instruction that plaintiff, who was injured by a train at a highway crossing, "should have stopped and placed himself in a position, if any such position was available, where he could have seen the train," as well as instructions from which the jury understood that plaintiff could not recover if he could have ascertained that a train was approaching, either by stopping his team or by leaving it and going ahead of it and around and beyond an obstruction placed by defendant, were erroneous in that they went beyond the rule of ordinary care and invaded the province of the jury. *Virgin v. Lake Erie, etc., R. Co.*, 216, 227 (15).
13. *Crossing Accidents.—Instructions.*—An instruction stating in general terms the degree of care required of a traveler on a highway on approaching a railroad crossing, as preliminary to the proposition that the burden of proof as to contributory negligence was upon defendant, was not, in view of other instructions stating the degree of care required of such traveler by the law, open to the objection that it left the degree of care required open to conjecture by the jury.
Cleveland, etc., R. Co. v. Champe, 243, 248 (3).
14. *Electric Railroads.—Duty to Servants.—Safety of Machinery and Appliances.*—The masterial duty to use reasonable care in providing suitable and safe equipment for the servant is applicable to a railway company operating cars by electricity or other motive power, and it is liable for an injury resulting proximately from a failure in that respect arising either from the incompetency of the servants to whom such duty was delegated, or from their failure, if competent, to make such reasonably careful inspection as the law requires of the master in the discharge of such duty.
Sullivan v. Indianapolis, etc., Traction Co., 407, 415 (6).

RAILROADS—Continued.

15. *Highway Crossings.—Rights of Persons on Highway.*—The rights of a railroad company whose tracks are lawfully on or across a public highway, and of a person lawfully using such highway, are equal, except that the railroad company has the prior right where both desire to use the highway at the same time and place; but the company's right of precedence is dependent upon its giving due notice of the approach of its train.
Virgin v. Lake Erie, etc., R. Co., 216, 222 (2).

16. *Highway Crossings.—Duty to Restore.—Instructions.*—Under subd. 5, §5195 Burns 1908, §3903 R. S. 1881, a railroad company must restore a highway crossed by it to its former state where it is practical to do so, otherwise it must be restored so as not to unnecessarily impair its usefulness; and a railroad company, using planks in restoring a highway, cannot arbitrarily determine the width of such planked portion of the crossing but is required to use the planks in such way and to such extent as to meet the requirements of the law; and, since by statute and the law independent of statute the right to interfere with a public highway carries the duty to use reasonable care and skill to make it as safe and serviceable as it was before it was disturbed, the question, in an action for injuries sustained at a railroad highway crossing, of whether defendant was negligent in the discharge of its duty in this respect was for the jury, and an instruction that defendant was not required to plank its crossing the full width of the highway was erroneous.

Virgin v. Lake Erie, etc., R. Co., 216, 229 (17).

17. *Operation.—Duty to Persons on Highway.*—The right of a railroad company to operate its trains is subject to the restrictions that it will use the care and prudence required by the law to avoid injuring persons lawfully upon the highway crossed by its tracks.

Virgin v. Lake Erie, etc., R. Co., 216, 225 (11).

RATIFICATION—

See ASSIGNMENT.

"REASONABLE CARE"—

See WORDS AND PHRASES.

REDEMPTION—

From purchaser, see MORTGAGES 2.

REFORMATION OF INSTRUMENTS—

1. *Contracts.—Burden of Proof.*—One seeking the reformation of a contract must clearly and fully establish by a fair preponderance of the evidence the provisions of the actual contract between the parties, that the instrument fails to express such contract, and that such failure was due to mutual mistake of fact or other ground authorizing such reformation, but he is not limited to making such proof by any particular kind or character of evidence.
Harmon v. Pohle, 439, 445 (10).
2. *Parol Evidence.—Modifying Contract.*—While as a general rule previous oral negotiations or stipulations between the parties are merged in the written contract and cannot be shown to modify it, they may be shown in case of fraud or mistake which prevented the writing from expressing the real contract.
United States, etc., Ins. Co. v. Emerick, 591, 594 (1).

REMAINDERS—

Vesting of Estate.—The law favors the vesting of remainders at the earliest possible moment.

Wheatcraft v. Wheatcraft, 283, 288 (5).

REMEDY—

See CANCELLATION OF INSTRUMENTS.

REPLEVIN—

1. *Description of Property.—Question for Court or Jury.*—The identity of property sought to be replevied, or the correctness of its description, is for the jury to determine from the evidence; but the question of the sufficiency of the description to pass title or sustain the action is for the court.

Hallagan v. Johnston, 509, 513 (3).

2. *Judgment.—Enforcement.*—To obtain any benefit of the adjudication of ownership in a replevin suit, where, pending the determination, the property remains with defendant, plaintiff should pursue the property by a writ of restitution, and, on failure to thus obtain the property, he should resort to the remedy of suit on the replevin bond; and where plaintiff followed the judgment in his favor by procuring the issuance of an ordinary execution, he waived whatever rights he had procured by the judgment *in rem*.

Hallagan v. Johnston, 509, 515 (6).

3. *Judgment.—Execution.*—Where defendants' decedent recovered a judgment in replevin for the return of a horse against a chattel mortgagor from whom plaintiff had purchased a horse, and caused an ordinary execution to be issued by virtue of which plaintiff's horse was taken and delivered to defendants' decedent, the proceedings following the judgment were irregular and unauthorized and could not preclude plaintiff from alleging and proving that the horse so taken was his own and that it was not the horse covered by the judgment in replevin.

Hallagan v. Johnston, 509, 515 (7).

4. *Pleading.—Counterclaim.*—In an action to replevy an automobile left with defendant for repairs, a counterclaim setting up a demand in favor of defendant arising out of repairs made by him while the property was in his possession, was properly pleaded.

Shore v. Ogden, 394, 396 (2).

5. *Pleading.—Counterclaim.*—A counterclaim is a proper pleading in an action of replevin when the facts set up therein are so connected with the subject of the action that equity requires that the matter alleged in the complaint and the counterclaim should all be settled in the same litigation. (*Baldwin v. Burrows* [1884], 95 Ind. 81, and *Shipman Coal Co. v. Pfeiffer* [1895], 11 Ind. App. 445, distinguished.) *Shore v. Ogden*, 394, 395 (1), 396 (1).

RESCISSION—

See CONTRACTS 8.

For fraud, see SALES 3, 4.

RESIDENCE—

See DIVORCE 5-8, 11-16.

REVIEW—

See DIVORCE 1.

As to evidence, see APPEAL 76-87.

REVIEW—Continued.

As to instructions, see APPEAL 88-97.

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Right of, see APPEAL 22.

RULES—

Violation of, see MASTER AND SERVANT 11.

SALES—

See CONTRACTS 9.

Unlawful, see INTOXICATING LIQUORS.

1. *Liability for Price.—Failure to Deliver Goods.*—The purchaser of a car of iron is not liable for its value where there was evidence to support the jury's finding that the goods were never delivered to such purchaser or received by it.
Vandalia R. Co. v. Upson Nut Co., 252, 258 (5).
2. *Misrepresentation as to Incumbrances.—Rights of Purchaser.*—Where property, in fact incumbered, was represented to the purchaser as free from incumbrance, and such representation was a material inducement to the making of the contract, such purchaser, if injured by the fact that the property as incumbered is worth less to him than if unincumbered, may rescind on discovering the fraud, even though he has not been deprived of possession by reason of such incumbrance.
A. D. Baker Co. v. Smedley, 79, 82 (4).
3. *Rescission.—Fraud.—Damages.*—Where a party relies upon the rescission of a contract of sale on the ground of fraud, he need not aver and prove a monetary damage.
A. D. Baker Co. v. Smedley, 79, 81 (1).
4. *Rescission for Fraud.—Statu Quo.*—Where the purchaser of a traction engine rescinded the contract of sale on the ground of fraud in the seller's representation that it was not incumbered by mortgage, he was not required, in order that the parties be placed in *statu quo*, to offer to return the reasonable value of the use of the engine for the time for which he used it where the representations as to the fitness of the engine were also untrue, and such value was less than the value of the repairs and the cost of rendering the engine suitable for use.
A. D. Baker Co. v. Smedley, 79, 84 (6).

SCHOOLS AND SCHOOL DISTRICTS—

1. *Action for Cost of Transporting Pupils.—Complaint.*—A complaint against a school township for the cost of transporting plaintiff's children, alleging "that the conveyance used for said transportation was a top buggy, closed with side curtains, and drawn by a horse owned and kept by this plaintiff," shows a sufficient compliance with §6423 Burns 1908, Acts 1907 p. 444. providing that "such transportation shall be in a comfortable and safe conveyance," etc.
Greenlee v. Newton School Tp., 630, 633 (3).
2. *Action for Cost of Transporting Pupils.—Complaint.—Allegation as to Appropriation.*—In an action to recover for transporting school children, allegations of the complaint showing that the township advisory board, at each of its annual meetings covering the period during which such transportation was had, appropriated the sum of \$500 for such purpose, were sufficient

SCHOOLS AND SCHOOL DISTRICTS—Continued.

without pleading the record of the advisory board, or alleging that such appropriation had not been expended, since it is never necessary to plead the evidence, and the entire expenditure of the appropriation, if a fact, is a matter of defense.

Greenlee v. Newton School Tp., 630, 634 (4).

3. *Abandonment.—Grounds for Abandonment.—Recovery for Transportation of Pupils.*—Although the unfavorable condition of roads, streams and bridges would probably be ground for enjoining the abandonment of a school under §6422 Burns 1908, Acts 1907 p. 444, where a school has been abandoned and the pupils have been transported to another school, proof that such conditions permitted abandonment is not essential to a recovery for the furnishing of such transportation.

Greenlee v. Newton School Tp., 630, 631 (1).

4. *Abandonment.—Transfer of Pupils.*—On the abandonment of a school under §6422 Burns 1908, Acts 1907 p. 444, there can be no transfer of the pupils in the sense contemplated by §6449 Burns 1908, Acts 1901 p. 448, and while the children from such abandoned school may become attached to another district by being enumerated therein, §6447 Burns 1908, Acts 1895 p. 127, relating to enumeration, does not make enumeration essential to attach children to a school district, but it is the apparent intention of that section that residence and not enumeration fixes the attachment. *Greenlee v. Newton School Tp.*, 630, 632 (2).

5. *Contracts.—Transportation of Pupils.*—The rule that a township trustee can not contract to pay a reasonable compensation for services to be rendered to the township, has no application to an executed contract, so that although no definite price for the transportation of school children pursuant to §6422 Burns 1908, Acts 1907 p. 444, had been agreed upon, where the contract had been fully executed, a recovery of the reasonable value of such service could be had.

Greenlee v. Newton School Tp., 630, 635 (6).

6. *Property.—Abandonment of Use.—Effect.*—Where property was granted to the trustees of a school township so long as used for school purposes, an abandonment of the school maintained thereon terminated the use of the township, regardless of the fact that a statute was in force authorizing or even requiring the reopening or reestablishing of such school.

Fall Creek School Tp. v. Shuman, 232, 236 (4).

7. *Transportation of Pupils.—Contract.—Necessity for Writing.*—Section 9598 Burns 1908, Acts 1899 p. 150, requiring certain contracts by school trustees to be in writing, does not apply to contracts for the transportation of pupils from abandoned schools under §6422 Burns 1908, Acts 1907 p. 444.

Greenlee v. Newton School Tp., 630, 635 (5).

SETTLEMENT—

Accounting and, see GUARDIAN AND WARD 1, 2.

Action to open and vacate, see GUARDIAN AND WARD 3-6, 12, 13.

SERVICE—

Of notice in drainage proceedings, see DRAINS 1.

Of notice to take deposition, see DEPOSITIONS 2.

SIGNALS—

Failure to give, see RAILROADS 10.

STATUTES—

See BUILDING AND LOAN ASSOCIATIONS 1, 2; COURTS; DEEDS 5; DIVORCE 13; EXCEPTIONS, BILL OF; EXECUTORS AND ADMINISTRATORS 2; GUARDIAN AND WARD 2; MUNICIPAL CORPORATIONS 4, 6; NEW TRIAL 1; TAXATION 3, 6; WORK AND LABOR.

In order to obtain the protection and benefit of a statute, one must bring himself clearly within its provisions, see ACTION.

1. *Codification.—Authority of Commissioners.*—Under the act of 1903 (Acts 1903 p. 391), creating a commission to codify the statutes concerning public, private, and other corporations, the commission had authority to codify all laws concerning public corporations such as towns, and such authority was broad enough to authorize the fixing of penalties to be inflicted upon the delinquent officials of such corporations.

State, ex rel. v. Schlicker, 318, 323 (4).

2. *Construction.*—A clear and unambiguous statute must be held to mean what it plainly says.

Pabst Brewing Co. v. Schuster, 375, 379 (2).

3. *Construction.—Repeal.*—In construing a statute to determine the scope of its repealing clause, it is the duty of the court to take into account the history of the act and the legislative intent.

State, ex rel. v. Schlicker, 318, 321 (3).

STATUTE OF LIMITATIONS—

See GUARDIAN AND WARD 9.

STOCK—

Contract for repurchase of, certificate, see CONTRACTS 1.

STOCKHOLDERS—

Liability of, see CORPORATIONS 2.

STREET RAILROADS—

1. *Injuries to Persons on Tracks.—Last Clear Chance.—Instructions.—Harmless Error.*—In an action for injuries to a child while crossing a street car track, an instruction on the doctrine of last clear chance, though erroneous in stating that plaintiff would be entitled to recover if the motorman by reasonable care on his part could have known that the child was in danger in time to stop the car and avoid the injury, and failed to do so, was harmless in view of such motorman's undisputed testimony that he saw the child.

Indianapolis Traction, etc., Co. v. Crolly, 543, 545 (1).

2. *Injuries to Persons on Tracks.—Contributory Negligence.—Last Clear Chance.*—Where plaintiff was negligent in getting into a place of danger in front of defendant's car, and the motorman saw him and could have avoided or mitigated the danger by the use of reasonable means at his command, the defendant is liable for the injuries sustained by plaintiff, even though the latter's negligence continued to the instant of injury, since in such case the negligence of the motorman in failing to take the

STREET RAILROADS—Continued.

proper precautions is regarded as the active or proximate cause of the injury. *Indiana Union Traction Co. v. Kraemer*, 190, 195 (5).

3. *Injuries to Persons on Tracks.—Contributory Negligence.—Jury Question.*—Where the evidence showed that plaintiff on starting to cross a street looked for an approaching car, that he could see for a distance of 490 feet and saw none, that when he had walked about forty feet and was six or seven feet from where he was struck, he again looked for a distance of thirty or forty feet and saw no car, the question of whether he was guilty of contributory negligence in failing to look for an approaching car at other times and places before reaching the track was one of fact for the jury.

Indiana Union Traction Co. v. Kraemer, 190, 192 (1).

4. *Injuries to Persons on Tracks.—Contributory Negligence.—Evidence.*—While a pedestrian, who looks before crossing a street car track, but fails to see an approaching car which is visible, will in case of injury be charged with having seen what he should have seen, where the evidence as to the speed of a car was conflicting and there was evidence from which the jury may have believed that the car approached at an unusual rate of speed, the court cannot say as a matter of law that plaintiff was guilty of contributory negligence, even though he could have seen the car when he looked, since on failing to see the car he may have been justified, from the usual speed of cars in that locality, in believing that he was safe in crossing.

Indiana Union Traction Co. v. Kraemer, 190, 192 (2).

5. *Injuries to persons on Tracks.—Contributory Negligence.—Last Clear Chance.*—Where there was evidence showing that a street car motorman saw a pedestrian crossing the street in such a manner that a collision seemed imminent, giving no indication of stopping, and by his conduct and appearance indicating to a reasonably prudent man that he was unconscious of the approach of the car, and saw that such pedestrian was closely approaching a place where he would be struck by the car, and the physical facts tend to show that the motorman could have so operated the car as to have avoided the injury, it became the duty of such motorman to take all reasonable measures to prevent the collision, and the jury was justified, in view of evidence that the motorman did not stop the car as soon as he could have, in finding defendant liable under the doctrine of last clear chance, regardless of plaintiff's negligence.

Indiana Union Traction Co. v. Kraemer, 190, 193 (3).

6. *Injuries to Persons on Tracks.—Negligence.—Contributory Negligence.—Jury Question.*—In an action for injuries caused by a street car colliding with plaintiff's wagon, where there was evidence showing that plaintiff drove upon the track at a place where the street was not lighted, to pass a coal wagon, and continued driving on the track for a distance of about seventy-five feet, and that before he was able to pass the wagon and turn off the track defendant's car approached from the rear at the rate of thirty-five to forty miles an hour, without sounding a gong or giving other warning of its approach, and struck plaintiff's wagon, and that before going on the track plaintiff looked, but saw no car, although the car was lighted and he had an unobstructed view for a distance of three or four squares, and other evidence showing that plaintiff turned upon the track about fifteen feet ahead of the car, that the motorman first saw him then and that it was impossible to prevent the collision,

STREET RAILROADS—Continued.

that the car was running at about eight miles an hour, and that the gong was repeatedly sounded, the questions of defendant's negligence, and contributory negligence by plaintiff, were properly submitted to the jury.

Indianapolis Traction, etc., Co. v. Taylor, 309, 311 (1).

SUBROGATION—

Foreclosure of Mortgage.—Purchase at Foreclosure Sale.—Where a mortgagor conveyed land, and his grantee assumed the payment of a mortgage thereon, the grantee could not, by suffering the mortgage to be foreclosed and buying in the title acquired by a purchaser at the foreclosure sale, acquire additional rights as against the right of possession by a tenant of the mortgagor under a lease for years, who was made a party to the foreclosure suit and defaulted. *Heaton v. Grant Lodge, etc.*, 100, 110 (9).

"SUBSCRIBE"—

See WORDS AND PHRASES.

SURETYSHIP—

Of wife, see HUSBAND AND WIFE 3, 5-7.

TAXATION—

1. *Excessive Levy.—Validity.*—A levy for taxes in aid of railroad construction is not invalid from the fact that the per centum fixed will produce an amount in excess of the amount of taxes authorized, where such excess as to each taxpayer's property is so small as to come within the maxim *de minimis non curat lex*, and especially in view of the language of §9577 Burns 1908, Acts 1899 p. 117, which seems to contemplate that a levy of taxes in such cases may necessarily result in an excess fund. *Cincinnati, etc., R. Co. v. Wayne Tp.*, 533, 539 (3).
2. *Penalties for Nonpayment.—Recovery of Penalties Paid.—Complaint.*—A penalty collected for delinquency in the payment of tax in aid of railroad construction, even if unauthorized, cannot be recovered on a complaint which does not show that the payment of such penalty was procured by fraud, or by mistake of fact, or that it was an involuntary payment within the meaning of the law. *Cincinnati, etc., R. Co. v. Wayne Tp.*, 533, 543 (6).
3. *Penalties for Nonpayment.—Statutes.—Tax in Aid of Railroads.*—Under §5476 Burns 1908, §4056 R. S. 1881, providing that taxes in aid of railroad construction are to be collected as other taxes are collected, the collection of the penalty for delinquency provided by §10321 Burns 1908, Acts 1897 p. 162, is authorized in case of delinquency in the payment of such tax. *Cincinnati, etc., R. Co. v. Wayne Tp.*, 533, 541 (5).
4. *Records.—Description.—Sufficiency.*—It is the policy of the law to preserve and enforce the lien of taxes, and courts will sustain descriptions in tax records to enforce such lien which would be insufficient to convey title by a tax deed based thereon. *Sullenger v. Baecher*, 365, 368 (2).
5. *Recovery of Taxes Paid.—Voluntary Payment Under Protest.*—In the absence of statutory authority therefor, there can be no recovery of taxes voluntarily paid, even though paid under protest. *Cincinnati, etc., R. Co. v. Wayne Tp.*, 533, 537 (1).

INDEX.

TAXATION—Continued.

6. *Recovery of Taxes Paid.—Statutes.—Sufficiency of Complaint.*

A complaint to recover from a township taxes paid by plaintiff in aid of railroad construction, which shows no demand or application to the board of county commissioners by claimant otherwise while such taxes were in the hands of the county treasurer, but which shows that the same were paid over to township trustee, does not state a cause of action within the provisions of §6088 Burns 1908, §5813 R. S. 1881, authorizing refund out of the county treasury of taxes wrongfully paid, so as the same were assessed and paid for county taxes.

Cincinnati, etc., R. Co. v. Wayne Tp., 533, 541

7. *Recovery of Taxes Paid.—Complaint.—Excessive Tax.—Wrong*

tax in aid of railroad construction was levied in excess of amount authorized, a complaint for the recovery of the tax levied upon plaintiff's property, which proceeded on the theory that the entire tax was invalid, and averred that plaintiff paid the entire amount on compulsion and under protest, insufficient, even if a recovery of the amount in excess of the authorized amount could be had, in the absence of allegations plaintiff offered to pay the portion represented by a correct centum of levy, or that the officer threatened to levy and his property for such excess alone. (*Dubois v. Board, etc.* [1889], 10 Ind. App 347; *Board, etc. v. Senn* [1889], 117 Ind. 410; *Evansville, etc., R. Co. v. Hays* [1889], 118 Ind. 214, distinguished.)

Cincinnati, etc., R. Co. v. Wayne Tp., 533, 537

8. *Tax Deeds.—Validity.—Defective Description.*—A tax deed land forming a part of survey No. 17, containing 200 acres based on descriptions in the various tax records as part of township 1, range 10, 100 acres, was wholly ineffective to convey title, since the description was insufficient to identify the land sought to be conveyed. *Sullenger v. Baecher*, 365, 367

9. *Tax Deeds.—Validity.—Presumptions.*—The presumption arising from the *prima facie* case made upon the question of title under §10380 Burns 1908, Acts 1891 p. 199, §206, providing that a tax deed shall be *prima facie* evidence of the regularity of the sale and all prior proceedings, as well as *prima facie* evidence of the premises described in the deed, and of a good and valid title in fee simple in the grantee of such deed, is subject to be rebutted by evidence showing the description to be so defective as to render the deed ineffectual to convey title.

Sullenger v. Baecher, 365, 369

TENANCY IN COMMON—

Adverse Possession.—Ouster.—A tenant in common can not acquire title by adverse possession against another tenant in common unless there has been a constructive or actual ouster, as the possession of one is the possession of all.

Sarrls v. Beckman, 638, 643

TENDER—

See CONTRACTS 7.

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For perfecting appeal, see **APPEAL** 28.

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Of vendor, see **DEEDS** 5.

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TORTS—

Of corporations, see **CORPORATIONS** 2.

“TRADE-NAMES”—

See **WORDS AND PHRASES**.

TRADE-MARKS AND TRADE-NAMES—

1. *Acquiring Trade-Names*.—Trade-names are acquired by adoption and user and belong to him who first used and gave them value. *Hartzler v. Goshen, etc., Ladder Co., 455, 465 (6).*
2. *Exclusive Trade-Names*.—Exclusive trade-names are protected very much upon the same principles as trade-marks, and the rules governing the latter are applicable in determining what may be an exclusive trade-name. *Hartzler v. Goshen, etc., Ladder Co., 455, 465 (4).*
3. *Nonexclusive Trade-Names*.—Nonexclusive trade-names are names that are *publici juris* in their primary sense, but which in a secondary sense have become indicative of the goods or business of a particular trader. *Hartzler v. Goshen, etc., Ladder Co., 455, 465 (5).*
4. *“Trade-Names”*.—“Trade-names” are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or a particular class of goods, but they are not technically trade-marks because not capable of exclusive appropriation as trade-marks, though they may or may not be exclusive. *Hartzler v. Goshen, etc., Ladder Co., 455, 464 (3).*
5. *“Unfair Competition”*.—“Unfair competition” is the passing off, or attempt to do so, upon the public, of the goods or business of one person as and for the goods or business of another, by means of either an implied or express representation to that effect, and any conduct, the natural and probable tendency and effect of which is to thus deceive the public, constitutes actionable unfair competition. *Hartzler v. Goshen, etc., Ladder Co., 455, 464 (1).*
6. *Unfair Competition. — Intent*. — An actual fraudulent intent need not be shown to make a case of unfair competition, especially where only preventive relief is sought. *Hartzler v. Goshen, etc., Ladder Co., 455, 466 (9).*
7. *Unfair Competition*.—Unfair competition is always a question of fact as to whether defendant is by his conduct passing off his goods or his business as that of the plaintiff. *Hartzler v. Goshen, etc., Ladder Co., 455, 465 (8).*

TRADE-MARKS AND TRADE-NAMES—Continued.

8. *Unfair Competition.*—A dealer coming into a field already occupied by a rival of established reputation must do nothing which will unnecessarily create or increase confusion between his goods or business and the goods or business of his rival.
Hartzler v. Goshen, etc., Ladder Co., 455, 466 (10).
9. *Unfair Competition.*—The use of circulars and advertisements calculated to deceive the public and pass off defendant's goods or business as that of the plaintiff constitutes unfair competition and will be enjoined.
Hartzler v. Goshen, etc., Ladder Co., 455, 467 (13).
10. *Unfair Competition.—Elements.*—Unfair competition is established by a showing that the defendant's conduct has either actually resulted, or will naturally and probably result, in deception and confusion whereby the goods of defendant will be purchased in the belief that they are those of the plaintiff.
Hartzler v. Goshen, etc., Ladder Co., 455, 465 (7).
11. *Unfair Competition.—Grounds of Relief.*—The basis of relief against unfair competition is found in the fact that one who builds a good will and reputation for his goods or business has thereby acquired a property right to the benefits of which he is entitled, and which, like other property, is protected against invasion.
Hartzler v. Goshen, etc., Ladder Co., 455, 464 (2).
12. *Unfair Competition.—Corporate Names.*—A corporate charter grants no immunity in the use of a deceptive name; hence the use of corporate names may be enjoined upon the general principles of trade-marks and unfair competition, where they are sufficiently similar to names in use by prior traders to produce confusion and injury.
Hartzler v. Goshen, etc., Ladder Co., 455, 467 (12).
13. *Unfair Competition.—Relief.—Injunction and Damages.*—Where a trade-name is innocently or ignorantly taken and used in a way which amounts to unfair competition, injunction is ordinarily the relief granted; but where such trade-name is so taken and used with knowledge of its prior use, an action at law for damages may be maintained.
Hartzler v. Goshen, etc., Ladder Co., 455, 470 (17).
14. *Unfair Competition.—Descriptive and Generic Names.*—Where descriptive and generic names by long usage have become identified in the minds of the public with the goods or business of a particular trader, their use by a subsequent trader in connection with similar goods or business in such manner as to deceive the public and pass off his goods or business for that of his rival, constitutes unfair competition.
Hartzler v. Goshen, etc., Ladder Co., 455, 466 (11).
15. *Unfair Competition.—Action.—Complaint.—Sufficiency.*—In an action for damages and injunctive relief on account of unfair competition, a complaint alleging facts showing a scheme to cause the public to believe that ladders manufactured by defendant were those of plaintiff's manufacture, by using the words "security ladder", which was the established trade-name for plaintiff's goods, as a part of its corporate name, "The Security Ladder Co.", which it placed upon its goods and advertising matter, was sufficient to show a conspiracy to adopt plaintiff's trade-name and to pass off the goods of defendant as the goods of plaintiff.
Hartzler v. Goshen, etc., Ladder Co., 455, 467 (14).
16. *Unfair Competition.—Evidence.—Sufficiency.—Fraud.*—In an action to enjoin unfair competition on the ground that defendant

TRADE-MARKS AND TRADE-NAMES—Continued.

was causing the public to believe that ladders of its manufacture were those of the plaintiff, evidence showing that plaintiff had used the name "Security" as a trade-name applied to a certain make of ladder, and had featured such ladder and name prominently in its advertising, that defendant's advertising matter also featured the name "Security" as its corporate name, and much of it was so similar in form to that sent out by the plaintiff as to actually mislead and deceive certain of plaintiff's customers, and that the name "Security" as adopted by defendant with full knowledge of the use to which it had been put by plaintiff, was sufficient to warrant the presumption of fraud in the selection of defendant's corporate name.

Hartzler v. Goshen, etc., Ladder Co., 455, 468 (15), 470 (15).

TRANSPORTATION—

Of pupils, see **SCHOOLS AND SCHOOL DISTRICTS** 5, 7.

Recovery for, of pupils, see **SCHOOLS AND SCHOOL DISTRICTS** 3.

TRESPASS—

1. *Excessive Damages.—Trespass De Bonis Asportatis.*—In an action for the value of sand wilfully taken from plaintiff's land without her consent, under evidence showing that it was worth fifteen cents a cubic yard on cars at the pit, that the cost of loading was from four to five cents per cubic yard, that the freight to the place of sale averaged twenty cents per cubic yard, that it sold for from thirty-five to fifty cents per cubic yard, and that at least 31,717 cubic yards of sand were thus taken and sold by defendant, a judgment for \$3,698.15 was not excessive.

American Sand, etc., Co. v. Spencer, 523, 532 (8).

2. *Trespass De Bonis Asportatis.—Time and Place of Conversion.*—The time and place of the conversion of any substance, such as sand or mineral, taken from the land of another, vary with the circumstances of each case, and may be the time and place of demand, or of sale, or of the consummation of the conversion by the removal of the substance from the owner's land.

American Sand, etc., Co. v. Spencer, 523, 531 (7).

3. *Trespass De Bonis Asportatis.—Innocent Trespass.—Measure of Damages.*—In an action to recover the value of mineral substance wrongfully taken from the land of plaintiff, where the trespass was innocent, and trespass to the land, as such, is not involved, the proper measure of damages is the value of the substance at the time and place where the trespasser converted it to his own use, less the amount such value was enhanced by his labor and expense.

American Sand, etc., Co. v. Spencer, 523, 529 (5).

4. *Trespass De Bonis Asportatis.—Wilful Trespass.—Measure of Damages.*—In an action to recover the value of sand wrongfully taken from the land of plaintiff, where trespass to the land, as such, is not involved, and the trespass complained of is within the class denominated as wilful, the measure of damages is the value of the sand at the time and place of the conversion, or the highest market price at any time between the severance and the conversion, deducting nothing on account of labor or expense.

American Sand, etc., Co. v. Spencer, 523, 530 (6).

5. *Trespass to Land.—Trespass De Bonis Asportatis.*—An action to recover the value as personal property of sand taken and re-

TRESPASS—Continued.

moved from plaintiff's land by defendant, where no damages were sought for injury to the land caused by defendant's acts, is in the nature of trespass *de bonis asportatis*, rather than trespass *quare clausum fregit*.

American Sand, etc., Co. v. Spencer, 523, 529 (4).

6. *Trespass to Land*.—“Innocent Trespasser”.—“Wilful Trespasser”.—One who unlawfully, but inadvertently or unintentionally, and in the honest and reasonable belief that he is exercising his own right, enters upon the lands of another and removes therefrom sand or other minerals, or cuts and removes therefrom growing timber, is an “innocent trespasser”; and one who unlawfully enters, recklessly or wilfully, or with an actual intent to do so, and removes any such substance is a “wilful trespasser”. *American Sand, etc., Co. v. Spencer*, 523, 527 (1).

7. *Wilful Trespass—Evidence*.—Evidence that defendant entered upon the land of plaintiff, without plaintiff's consent, and removed sand therefrom, knowing at the time that the land belonged to plaintiff, was sufficient to support a finding of wilful trespass, though defendant's evidence showed that notwithstanding its knowledge of the facts it believed it had a right to remove such sand, since knowledge of the facts requires a presumption that the law applicable thereto is also known.

American Sand, etc., Co. v. Spencer, 523, 528 (3).

TRIAL.

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| I. COURSE AND CONDUCT OF TRIAL IN GENERAL, 1, 2. | IV. INSTRUCTIONS, 6-19. |
| II. RECEPTION OF EVIDENCE, 3, 4. | V. VERDICT AND ANSWERS TO INTERROGATORIES, 20-27. |
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Right of, by jury, see JURY 1, 2.

I. COURSE AND CONDUCT OF TRIAL IN GENERAL.

1. *Questions for Court and Jury*.—It is for the court to say whether there is any evidence tending to support any material issue of fact, but if there is such evidence, its weight or probative value is for the jury.

Sullivan v. Indianapolis, etc., Traction Co., 407, 413 (1).

2. *Province of Court and Jury—Construction of Instruments*.—That the construction of a written instrument was a question of law for the court did not render its admission in evidence erroneous, since such admission in no way affected the duty of the court to construe and give legal effect to the instrument.

Patterson v. State Bank, etc., 331, 338 (7).

II. RECEPTION OF EVIDENCE.

3. *Duty to Show Relevancy*.—Where offered evidence does not appear relevant to the issues, the one offering it should either introduce such evidence as will show its relevancy, or, by statement satisfactory to the court, show that the offered evidence will be connected by other proof so as to make it relevant and competent.

Cohen v. Reichman, 164, 171 (13).

4. *Proof—Allegations of Complaint*.—Immaterial allegations in a complaint need not be proven to warrant a recovery, and literal

TRIAL—Continued.

proof of the material allegations is not essential, but it will suffice if the substance of the issue tendered has been proven by a fair preponderance of the evidence.

National Fire, etc., Co. v. Smith, 124, 145 (18).

III. DIRECTING VERDICT.

5. Where there is a total failure of evidence to prove any fact essential to recovery by plaintiff, it is the duty of the trial court, upon proper motion, to direct a verdict for defendant.

Sullivan v. Indianapolis, etc., Traction Co., 407, 414 (3).

IV. INSTRUCTIONS.

See APPEAL 19, 20, 133-148; CARRIERS 3, 4; MASTER AND SERVANT 8, 44-48, 50; NEGLIGENCE 3, 8; RAILROADS 4, 11-13, 16; STREET RAILROADS 1.

Peremptory, see GUARDIAN AND WARD 7.

Review as to, see APPEAL 88-97.

6. *Burden of Proof.*—An instruction that defendants had the burden of proving their counterclaim by a fair preponderance of the evidence, and that such "evidence must be of the most persuasive character" was erroneous in specifying the character of evidence required. *Harmon v. Pohle*, 439, 445 (9).

7. *Burden of Proof.*—Instructions that plaintiff is required to prove all the material allegations of his complaint by a fair preponderance of the evidence, that it is not meant that he is required to prove every allegation, but that he must so prove enough of the allegations to make out a case against the defendant were not erroneous in what they stated, but were incomplete. *National Fire, etc., Co. v. Smith*, 124, 144 (16).

8. *Limiting Effect of Evidence.—Duty of Parties.*—Where a party fears an improper application of evidence admitted for a special purpose, it should request an instruction limiting the effect of such evidence. *Templer v. Lee*, 433, 438 (4).

9. *Repetition.*—Where the court had stated in one instruction the conditions under which the doctrine of last clear chance applies, it was not necessary to repeat them in another instruction in which the doctrine was referred to.

Cleveland, etc., R. Co. v. Champe, 243, 250 (6).

10. Instructions should correctly inform the jury as to the law applicable to the case, and leave the jury free to determine the facts from the evidence on all questions where the evidence is conflicting, or where the facts, though undisputed, are of such character that reasonable minds might draw different conclusions therefrom. *Virgin v. Lake Erie, etc., R. Co.*, 216, 221 (1).

11. *Province of Jury.—Testimony of Experts.*—An instruction that the opinions of experts are not admitted for the purposes of controlling the judgment of the jury, but to be considered for what they are worth in the opinion of the jury when considered in connection with the other evidence, invaded the province of the jury. *Indianapolis Traction, etc., Co. v. Taylor*, 309, 315 (5).

12. *Inferences from Facts Proved.—Negligence.*—While it is error to tell a jury what inference it shall, must, or ought to draw from certain facts, the court does not invade the province of the jury by stating in an instruction that negligence might be in-

TRIAL—Continued.

ferred if certain facts were found to be proved, but is thereby exercising the prerogative and duty of the court.

Talge Mahogany Co. v. Hockett, 303, 305 (1).

13. *Testimony of Experts.*—Instructions should be free from any tendency to discredit expert witnesses and to disparage their testimony, hence an instruction that in effect told the jury that it had a right to reject the testimony of the expert witnesses, or of any of them, if from the evidence it thought it ought to do so, was erroneous, since it may have been accepted by the jury as a warrant to reject such testimony regardless of its truth.

Indianapolis Traction, etc., Co. v. Taylor, 309, 313 (3), 314 (3).

14. *Issues.—Misleading Instructions.*—In an action involving an issue as to the reformation of the lease sued on, an instruction as to the burden of proof under the pleading tendering such issue, stating that “reformation is a much more delicate remedy than rescission”, was erroneous, since there was no issue involving rescission and the instruction left the jury to speculate on the suggested comparison.

Harmon v. Pohle, 439, 445 (8).

15. *Issues.—Misleading Instructions.*—In an action on a lease, where the answer alleged that the actual agreement was that lessee was to clear fifteen acres every two years and that by mutual mistake the lease did not express the real agreement, and the prayer was for a reformation of the lease to express such agreement, an instruction that the substance of defendants’ answer was that defendants were only to clear fifteen acres every two years “instead of fifteen acres every year as alleged by the plaintiff”, was misleading in that it indicated that defendants were relying on the lease as written, whereas the real issue tendered by the answer was that of the reformation of the lease to express the actual contract.

Harmon v. Pohle, 439, 444 (7).

16. *Issues.—Misleading Instructions.*—Where a lease provided that the lessee was to build a barn “on some part of the above described real estate owned by the lessor”, but such lease did not cover all the land of the lessor which was described therein, and the complaint alleged that “plaintiff and defendants after the execution of said lease further agreed that said written lease should be further changed in that the barn provided for should be built” according to certain specifications, instructions telling the jury that the substance of the complaint was that the lease should be changed “so that defendants were to build a barn on plaintiff’s real estate so leased to defendants”, etc., were misleading and confusing as to the issue tendered by such complaint.

Harmon v. Pohle, 439, 443 (5).

17. *Peremptory Instructions.*—A peremptory instruction should be given only where there is a total absence of evidence on some essential issue, or where there is no conflict in the evidence and the only inference that may be drawn therefrom favors the party asking the instruction.

Baker v. Bundy, 272, 278 (4).

18. *Motion for Peremptory Instructions.—Waiver of Error.*—Defendant by offering evidence in his behalf and proceeding in the trial to verdict and judgment, after the overruling of a motion for peremptory instruction, waives the error, if any, in the overruling of such motion.

Illinois Surety Co. v. State, ex rel., 31, 35 (2).

19. *Motion for Peremptory Instruction.—Consideration of Evidence.*—In deciding the question presented by a motion for peremptory instructions, only such evidence as is favorable to the

TRIAL—Continued.

party opposed to the motion should be considered, and while a mere scintilla or suggestion of evidence is insufficient to establish a material and issuable fact, the court should consider any fact or circumstance shown by the evidence which is pertinent to such issue, as well as any inferences which the jury might reasonably draw therefrom, and if the facts and circumstances proven are susceptible to different reasonable inferences, the direction of a verdict is erroneous.

Sullivan v. Indianapolis, etc., Traction Co., 407, 413 (2).

V. VERDICT AND ANSWERS TO INTERROGATORIES.**VERDICT.**

See APPEAL 104-109; MASTER AND SERVANT 18-24; NEGLIGENCE 2.

Initial attack after, see PLEADING 7.

ANSWERS TO INTERROGATORIES.

See APPEAL 90, 108, 109, 120; MASTER AND SERVANT 18-24, 49; NEGLIGENCE 2.

Ruling on motion for judgment on, see APPEAL 59.

20. *Verdict.—Scope.*—A general verdict includes a finding of every issuable fact essential to its support.

Hall v. Grand Lodge, etc., 324, 329 (4).

21. *General Verdict.—Scope.*—A general verdict for plaintiff finds for him upon every material issue presented by the complaint.

Egan v. Louisville, etc., Traction Co., 423, 425 (3).

22. *General Verdict.—Answers to Interrogatories.*—A general verdict is controlled by the jury's answers to interrogatories only when the latter are in irreconcilable conflict with it.

Egan v. Louisville, etc., Traction Co., 423, 427 (5).

23. *Verdict.—Answers to Interrogatories.*—Answers to interrogatories will not overthrow the general verdict if they can be reconciled therewith by any evidence admissible within the issues.

Kingan & Co. v. Gleason, 684, 691 (8).

24. *Verdict.—Answers to Interrogatories.*—Contradictory answers to interrogatories nullify each other, and a judgment cannot be based upon answers that are not inconsistent with the general verdict.

National Fire, etc., Co. v. Smith, 124, 142 (12).

25. *Verdict.—Answers to Interrogatories.*—Answers that are contradictory nullify each other, and they are also unavailing unless the conflict between them and the general verdict is such that it cannot be explained or removed by any evidence admissible under the issues.

Illinois Surety Co. v. State, ex rel., 31, 36 (5).

26. *Verdict.—Answers to Interrogatories.*—A general verdict for plaintiff decides all the material issues in his favor, and is not overcome by the jury's answers to interrogatories except when there is such antagonism between them that both cannot stand.

Beard v. Goulding, 398, 401 (1).

27. *Verdict.—Scope.—Answers to Interrogatories.*—A general verdict for plaintiff determines all the material allegations of the complaint in favor of the pleader, and carries with it every presumption and inference of fact which might have been drawn from evidence properly admissible under the issues, and it is overcome by answers to interrogatories only when they are in such irreconcilable conflict with it that both cannot stand.

Patterson v. State Bank, etc., 331, 336 (3).

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VI. FINDINGS.

See APPEAL 77, 78, 110-116; GIFTS 3; MINES AND MINING 1, 2; PARENT AND CHILD; WATERS AND WATERCOURSES.

28. *Burden of Proof.—Sufficiency.*—In an action against a husband and wife to foreclose a mortgage signed by both, where the note secured thereby was signed by the husband only, and plaintiff, to avoid the presumption that the debt was that of the husband alone, averred that the debt was their joint debt, a failure to find that the note and mortgage represented the joint debt of defendants, was equivalent to a finding of such fact against the plaintiff, who had the burden of proving the material allegations of his complaint, so that the findings, though defective, were sufficient to prevent a judgment against the wife.

Carnahan v. Shull, 349, 352 (2).

29. *Conclusions of Law.*—Where the facts found in a special finding lead to but one conclusion or result, the deduction is a conclusion of law and not an ultimate fact.

Crawfordsville Trust Co. v. Ramsey, 40, 74 (14).

30. *Conclusions of Law.—Exceptions.*—Exceptions to conclusions of law concede, for the purposes of the exceptions, that the facts are fully and correctly found.

Carnahan v. Shull, 349, 352 (3).

31. *Exceptions to Conclusions of Law.—Effect.*—Exceptions to conclusions of law admit, for the purposes of the exceptions, that the facts within the issues were fully and correctly found.

Guyer v. Union Trust Co., 472, 487 (8).

32. *Conclusions of Law.*—Where the issues involved were as to the validity of an assignment of stocks and bonds made by plaintiff's husband while *in extremis* for the purpose of effectuating the provisions of his will creating a charitable trust, and as to plaintiff's right as widow to take her one-third in the property assigned, a finding of facts showing the assignment invalid was sufficient to warrant a conclusion that plaintiff is entitled to her distributive share as widow in the property involved in such assignment.

Crawfordsville Trust Co. v. Ramsey, 40, 73 (13).

33. *Failure to Find Fact.*—The failure of the trial court to find a fact as to which defendant had the burden of proof is equivalent to a finding against him as to such fact.

Deemer v. Knight, 397, 398 (2).

34. *Special Findings.—Sufficiency.*—In an action to foreclose a mortgage, where defendants contended that plaintiff had been given a chattel mortgage which was to be the primary security, but that plaintiff had lost the lien of same by its negligence in recording it, a finding of facts showing that plaintiff was merely a nominal party in the proceeding in which plaintiff's security under such chattel mortgage was denied, that the real party in interest was one of the defendants in the foreclosure suit, and that in such prior proceeding such chattel mortgage was adjudicated not to be a lien for the reason that it was not filed for record in time, are consistent with and support the conclusion of law against the defendants on the issue that plaintiff's negligence in recording such chattel mortgage was adjudicated in such former proceeding, in the absence of a finding that plaintiff was charged with any duty with respect to recording same.

Guyer v. Union Trust Co., 472, 487 (10).

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35. *Venire de Novo*.—*Grounds*.—The failure to find material facts in a special finding is not cause for a *venire de novo*.

City of Huntington v. Kaufman, 341, 344 (3).

36. *Sufficiency*.—*Venire de Novo*.—If a finding of facts contains enough substance to support a judgment it will not be objectionable because it does not find all the issuable facts and a *venire de novo* should not be granted unless the finding is so defective or uncertain on its face that it is incapable of supporting any conclusion of law or forming the basis of any judgment on the issues involved.

Carnahan v. Shull, 349, 351 (1).

TRUSTS—

1. *Action by Trustee*.—*Pleading*.—In an action by the trustee of an express trust, the complaint should disclose the name of the *cestui que trust*, and show that the suit is prosecuted for his benefit.

Guyer v. Union Trust Co., 472, 490 (12).

2. *Action to Remove Trustee*.—*Grounds*.—*Interest of Remainderman*.—Where the only purpose of an action was the removal of a trustee on account of a breach of his trust, both the *cestui que trust* and the remainderman, being interested in the faithful performance of the trust, were properly joined as plaintiffs, in view of §4023 Burns 1908, §2980 R. S. 1881, providing that trustees may be removed for the violation or attempted violation of any express trust, or for other causes, on petition of any person interested, and the complaint was not insufficient, although the causes assigned for removal did not directly affect or harm such remainderman.

Wheatcraft v. Wheatcraft, 283, 288 (6).

3. *Action to Remove Trustee*.—*Complaint*.—*Parties*.—*Joinder of Remainderman and Cestui Que Trust*.—A complaint, in which the *cestui que trust* and the remainderman joined as plaintiffs, seeking the removal of the trustee, and which disclosed that the *cestui* was to receive the rents and profits of the estate annually during life and that at her death the trust should terminate and the real estate should go to such remainderman, sufficiently showed an interest entitling the latter to join as plaintiff.

Wheatcraft v. Wheatcraft, 283, 288 (4).

4. *Action to Remove Trustee*.—*Jurisdiction*.—A petition merely seeking the removal of a trustee, resident of a county other than that in which the trust estate is situate, and showing that the real estate in which the trust was created is situate in the county where the petition was filed, and that the deed was recorded in such county, brings the proceeding within the general rule giving jurisdiction of a trust to the circuit court of the county in which it was created.

Wheatcraft v. Wheatcraft, 283, 286 (1).

5. *Removal of Trustee*.—*Grounds*.—*Complaint*.—While not every violation of duty or mismanagement on the part of a trustee will necessitate his removal, especially if the trust fund is not thereby endangered, under §4023 Burns 1908, §2980 R. S. 1881, providing for the removal of trustees, a breach of the trust is sufficient ground for removal if it endangers or impairs the trust fund; hence a complaint seeking the removal of a trustee for the reason that he had not annually paid over to the *cestui que trust* the rents and profits of the estate as provided in the trust deed was sufficient to meet the requirements of the statute.

Wheatcraft v. Wheatcraft, 283, 290 (7).

6. *Constructive Trusts*.—*Right of Beneficiary to Repudiate*.—*Action*.—One whose money has been obtained by another under cir-

TRUSTS—Continued.

circumstances giving rise to a constructive trust may repudiate or ignore the trust and bring an action at law to recover the amount.

Baker v. Bundy, 272, 277 (3).

7. *Construction of Trust Deed.*—"Child".—"Children".—Although *prima facie* the word "child" or "children" when used in a statute or will means legitimate child or children, where it appears that at the time of creating a trust in real estate in favor of grantor's daughter, with remainder to the child or children of such daughter, such daughter was unmarried and had a child then in being, it must be presumed that the deed was made with reference to the existence of such child.

Wheatcraft v. Wheatcraft, 283, 287 (3).

8. *Resulting Trusts.*—*Evidence.*—Evidence merely showing that some of the money inherited by plaintiff's mother was by the latter applied on the payment of the purchase price of land conveyed to her and her husband jointly, but not showing the amount, and also showing that money belonging to the husband was applied to the payment of the purchase price, and failing to show that the title was taken in their joint names without the consent of plaintiff's mother, or that there was any agreement entered into at the time by which the title was to be held in trust for plaintiff's mother, was not sufficient to show an implied or resulting trust under the provisions of §§4017, 4019 Burns 1908, §§2974, 2976 R. S. 1881, relating to the establishment of such trusts.

Tharp v. Updike, 452, 454 (2).

"UNFAIR COMPETITION"—

See WORDS AND PHRASES; TRADE-MARKS AND TRADE-NAMES 5-16.

UNGUARDED COGWHEELS—

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VALUE—

Of property, see EVIDENCE 1, 9.

VENDOR AND PURCHASER—

1. *Bona Fide Purchaser.*—*Purchaser Under Quitclaim Deed.*—The grantee in a quitclaim deed may be entitled to the protection afforded a *bona fide* purchaser on establishing by proof that the purchase was in good faith and that the consideration paid was a fair price.
Sullenger v. Baecher, 365, 371 (8).
2. *Bona Fide Purchaser.*—*Evidence.*—*Sufficiency.*—Where one seeking to establish title in himself by virtue of a quitclaim deed from a grantor who had been divested of all right and interest in the land conveyed failed to prove that the consideration paid was a fair or reasonable price for the land, the evidence failed to show that he was a *bona fide* purchaser for value and was insufficient to sustain a verdict on the theory that he acquired title by such deed.
Sullenger v. Baecher, 365, 372 (9).
3. *Contract for Sale of Real Estate.*—*Construction.*—On appeal to the equity side of the court, a contract for the sale of real estate will be so construed as not to give either party an unfair advantage.
Kimberlin v. Templeton, 155, 160 (2).

VENDOR AND PURCHASER—Continued.

4. *Contract for Sale of Real Estate.—Title of Vendee.—Equitable Ownership.*—Where there is a contract for the sale of real estate, the vendor simply holds the title as security for the purchase money, and the vendee becomes the equitable owner thereof so that he secures all the benefits and assumes all the risks of ownership. *Kimberlin v. Templeton*, 155, 160 (1), 161 (1).
5. *Evidence as to Purchase in Good Faith.—Burden of Proof.*—The grantee in a quitclaim deed from one who had been divested of his rights and interest, if he relies on such deed to establish title in himself, has the burden of proving that he was a purchaser in good faith and for a valuable consideration, without notice either actual or constructive of the rights of the person to whom the title of his grantor had previously passed. *Sullenger v. Baecher*, 365, 370 (6).

VENIRE DE NOVO—

See APPEAL 112; TRIAL 35, 36.

VENUE—

1. *Motion for Change.—Action on Motion.*—A court may properly suspend action on a motion for a change of venue from the county until the issues are made, hence requiring defendant to answer interrogatories pending the disposition of his motion for a change of venue was not error. *Houser v. Laughlin*, 563, 571 (4).
2. *Motion for Change.—Denial.*—While as a general rule, in a civil action, a motion for a change of venue, seasonably made, should be granted, where the filing of such a motion is admitted to be for the purpose of obtaining a continuance, the court is justified in overruling such motion or in striking it from the files. *Houser v. Laughlin*, 563, 569 (2), 571 (2).

VERDICT—

See TRIAL 20-27.

VERIFICATION—

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VIOLATION—

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Of error, see APPEAL 152, 153; MASTER AND SERVANT 33; TRIAL 18.

Of objections, see APPEAL 54.

Of conditions precedent, see PLEADING 12.

WARRANTY—

See COVENANTS 1-5.

WATERS AND WATERCOURSES—

Surface Waters.—Action for Damages.—Findings.—On a special finding of facts showing that defendant's remote grantors had for more than twenty years maintained drains which carried surface water into a culvert, and across a highway to and over a low strip in plaintiff's lands, whence such water was carried into a natural watercourse, and that such drains were in natural depressions and carried no water that would not naturally have flowed through such depressions, the court did not err in denying to plaintiff any relief in his action for damages for casting surface waters upon his lands.

Seigmund v. Williams, 498, 500 (1).

WAYS—

Choice of, see MASTER AND SERVANT 12.

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"WILFUL TRESPASSER"—

See WORDS AND PHRASES.

WILLS—

See HUSBAND AND WIFE 8.

1. *Construction.—Intention of Testator.—Ascertainment of Devisee.*—The pole star in the construction of a will is the intention of the testator, and to ascertain and give effect to such intention, courts may hear evidence of extrinsic facts for the purpose of removing latent ambiguities and to enable them to identify either the subject-matter or object of the testator's bounty, and a bequest will not be avoided if the intent can thus be established with reasonable certainty; hence a devise to "The Odd Fellows' Orphan Home at Greensburg, Decatur County, Indiana", was not void on the ground that there was no organization by that name, where the evidence and the findings show that the testator intended the Odd Fellows Home at Greensburg.

Hall v. Grand Lodge, etc, 324, 327 (3).

2. *Election by Widow.—Action.—Appeal.—Time for Perfecting.*—An action by the widow of a testator, in which no issues were tendered involving any question as to her right to share in the estate as widow, but in which the questions were whether she should be bound by her election to take under the will, and whether deceased in his lifetime had made a valid transfer and assignment of certain stocks and bonds so that they were no part of his estate at the time of his death, is not in any way affected by the decedents' estates act, and hence §§2977, 2978 Burns 1908, §2454 R. S. 1881, Acts 1899 p. 397, providing that on appeal from a judgment growing out of a matter connected with a decedent's estate the transcript must be filed within one hundred days after rendition of the judgment, are not applicable.

Crawfordsville Trust Co. v. Ramsey, 40, 60 (1).

3. *Estates Created.—Life Estate with Power of Disposition.*—A devise of an estate in lands to a person generally or indefinitely with a power of disposition carries the fee, but where by clear and definite language the testator expressly gives to the first taker an estate for life only, coupled with a power of disposition, the express limitation of the grant to an estate for life controls,

WILLS—Continued.

and such devisee does not acquire the fee, but takes for life only, with such power of disposition as the will authorizes.

Hall v. Grand Lodge, etc., 324, 327 (2).

4. *Judgment of Invalidity.—Effect.*—Where a will has been declared void in its entirety, it is void as to all persons interested therein, including testator's widow notwithstanding she had previously elected to take thereunder.

Crawfordsville Trust Co. v. Ramsey, 40, 62 (2).

WITNESSES—

See DIVORCE 14-17.

1. *Experts.—Credibility.—Weight of Testimony.*—An expert witness is upon the same footing as any other witness in so far as his credibility is concerned, and the weight of his testimony should be determined by the same rules, so far as applicable, which apply to the testimony of other witnesses.

Indianapolis Traction, etc., Co. v. Taylor, 309, 313 (2).

2. *Discretion of Trial Court.—Cross-Examination.*—In a servant's action for personal injuries, where the defense was that plaintiff was a malingerer, and defendant on cross-examination of a witness had brought out the fact that a certain doctor had refused to come to attend plaintiff when called, the admission of an answer on redirect examination that the reason the doctor would not come was because the witness' mother did not have the money to pay his charge, was within the discretion of the court and not erroneous, though the question called for hearsay evidence.

Burford v. Dautrich, 384, 390 (7).

WORDS AND PHRASES—

"Child" and "children" when used in a statute or will, meaning of, see TRUSTS 7.

"Innocent Trespasser," who is an, see TRESPASS 6.

"Laches" definition of, see EQUITY.

"Reasonable care" meaning of as applied to master and to servant, see MASTER AND SERVANT 43.

"Subscribe" meaning of, see DIVORCE 9.

"Trade-Names" meaning of, see TRADE-MARKS AND TRADE-NAMES 4.

"Unfair Competition" meaning of, see TRADE-MARKS AND TRADE-NAMES 5.

"Wilful Trespasser," who is a, see TRESPASS 6.

1. *"Payment."*—In legal contemplation a payment is the discharge in money, or its equivalent, of an obligation or debt owing by one person to another.

Morris v. Reyman, 112, 114 (2).

2. *"Public Policy."*—While the character and limits of public policy are difficult of determination with any degree of exactness, the term is often defined as the policy of the law; hence the public policy of a state is the law of the state as expressed in its constitution and statute laws.

Adams v. Union Nat. Sav., etc., Assn., 676, 679 (2).

3. *"Purview."*—The word "purview" as used in the law, means the enacting part of a statute as distinguished from the preamble, so that the provision of an act repealing all acts coming within its purview must be understood as repealing all acts in relation to all cases provided for by the repealing act, and not merely such as are inconsistent with its provisions.

State, ex rel. v. Schlicker, 318, 321 (2).

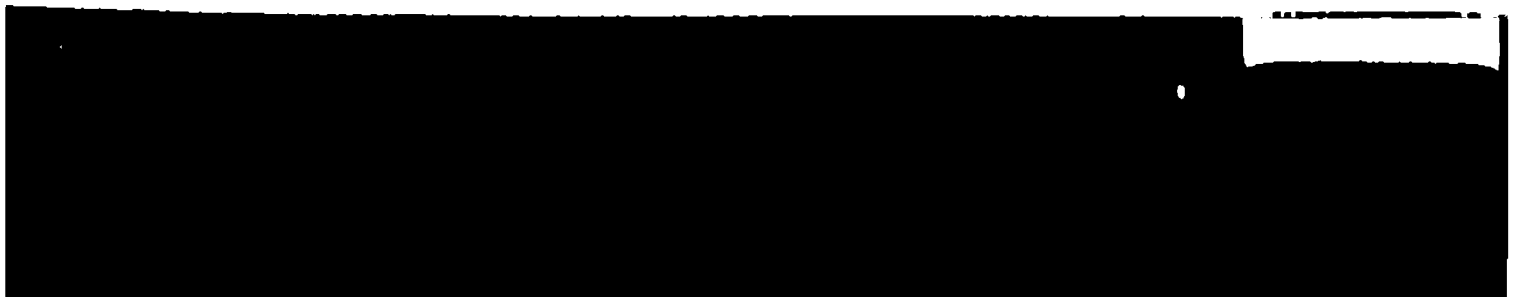
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WORK AND LABOR—

Action on Quantum Meruit.—Complaint.—Commission Contract Statutes.—A complaint alleging that defendant employed plaintiff to obtain an option of purchase on certain real estate, that plaintiff performed the services, that defendant approved the arrangements and contracts made by plaintiff in his behalf under employment and approved the price agreed upon, and that plaintiff's services were reasonably worth a certain per centum on amount of the purchase price, is sufficient as a common count the *quantum meruit*, and is not in any way controlled by § Burns 1908, Acts 1901 p. 104, requiring contracts for commission for the sale of real estate to be in writing.

Pierson v. Donham, 636, 637

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